No. 00-6567-CFX Title: Larry Dean Dusenbery, Petitioner
v.
United States

Docketed: October 16, 2000 Court: United States Court of Appeals for the Sixth Circuit

Entry	Date	Proceedings and Orders
	Oct 16 2000	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due January 17, 2001)
	Oct 24 2000	Waiver of right of respondent United States to respond filed.
	Nov 2 2000	DISTRIBUTED for Conference of November 22, 2000
	Dec 5 2000	RESPONSE REQUEST -- Due January 6, 2001.
	Dec 14 2000	Order extending time to file response to petition until January 17, 2001.
	Jan 17 2001	Brief of respondent United States in oppcsition filed.
	Jan 26 2001	Reply brief of petitioner Larry Dean Dusenbery filed.
	Feb 1 2001	REDISTRIBUTED for Conference of February 16, 2001
	Feb 20 2001	REDISTRIBUTED for Conference of February 23, 2001
	Feb 26 2001	Petition GRANTED. limited to Question 1 presented by the petition. SET FOR ARGUMENT October 29, 2001. **********
	Mar 13 2001	Motion of petitioner for appointment of counsel filed.
	Mar 19 2001	Motion DISTRIBUTED. March 23, 2001 (Page 18)
	Mar 26 2001	Motion for appointment of counsel GRANTED and it is ordered that Allison M. Zieve, Esq., of Washington, D.C., is appointed to serve as counsel for the petitioner in this case.
	Apr 2 2001	Order extending time to file the joint appendix and petitioner's brief on the merits to and including May 14, 2001.
	May 10 2001	Joint appendix filed.
	May 14 2001	Brief of petitioner Larry Dean Dusenbery filed.
	May 14 2001	Brief of DKT Liberty Project filed.
	Jun 14 2001	Order extending time to file respondent's brief on the merits to and including July 16, 2001.
	Jul 16 2001	Brief of respondent United States filed.
	Aug 14 2001	CIRCULATED.
	Aug 14 2001	Reply brief of petitioner Larry Dean Dusenbery filed.
	Aug 22 2001	Record filed.
	Sep 12 2001	Record filed.
	Oct 25 2001	Letter received from the Solicitor General - 20 copies of updated information respecting the Bureau of Prisonsprocedures.
	Oct 29 2001	ARGUED.

1PP

GRANTED

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000
CASE NO. 00-6567

(2)

Supreme Court, U.S.
FILED
OCT 16 2000
OFFICE OF THE CLERK

LARRY DEAN DUSENBERY,

PETITIONER,

-VS-

UNITED STATES OF AMERICA,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Larry Dean Dusenbery, acting pro se, pursuant to Rule 39 asks leave to file the enclosed petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of cost, and to proceed in forma pauperis.

Respectfully submitted,

RECEIVED
OCT 16 2000
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Larry Dean Dusenbery
Petitioner in pro per
Reg. No. 50908-060
U. S. P. Allenwood
P. O. Box 3000
Whitedeer, PA 17887

87 pp

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000
CASE NO. 00-6567

LARRY DEAN DUSENBERY,

PETITIONER,

-VS-

UNITED STATES OF AMERICA,

RESPONDENT.

Supreme Court, U.S.
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AFFIDAVIT OF INDIGENCE

I, Larry Dean Dusenbery, declare that I am the petitioner in the above-entitled proceeding; that, in support of my request to proceed without being required to prepay fees, cost, or give security therefor, I state that because of my poverty, I am unable to pay the cost of said proceedings or give security therefor; that I believe I am entitled to relief. The nature of my action, defense, or other proceedings or the issues I intend to present in my petition for Writ of Certiorari are briefly stated as follows:

1) Whether the court should grant certiorari to resolve the split among the circuits as to whether a prisoner must receive "actual notice" regarding a forfeiture notification.

In further support of this application, I answer the following questions:

1) Are you presently employed?

No.

2) Have you received within the past twelve months any money from any of the following sources:

A. Business, profession or other form of self-employment?

No.

B. Rent payments, interests or dividends?

No.

C. Pensions, annuities or life insurance payments?

No.

D. Gifts or inheritance?

No.

E. Any other sources?

No.

3) Do you own any cash, or do you have money in checking or savings account?

No.

4) Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property?

No.

5) List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

No dependents.

I declare under penalty of perjury that the foregoing is true and correct pursuant to 28 USC Section 1746.

FURTHER I SAYETH NOT.

Executed on 3rd day of October, 2000.

Larry Dean Dusenbery

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000
CASE NO. 00-6567

LARRY DEAN DUSENBERY,

PETITIONER,

-VS-

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Larry Dean Dusenbery
Petitioner in pro per
Reg. No. 50908-060
U. S. P. Allenwood
P. O. Box 3000
Whitedeer, PA 17887

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000
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LARRY DEAN DUSENBERY,

PETITIONER,

-VS-

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Supreme Court, U.S.
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PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Larry Dean Dusenbery
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Reg. No. 50908-060
U. S. P. Allenwood
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Whitedeer, PA 17887

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QUESTIONS PRESENTED

I. SHOULD THIS COURT GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER A PRISONER MUST RECEIVE "ACTUAL NOTICE" REGARDING A FORFEITURE NOTIFICATION?

II. CAN THE GOVERNMENT FORFEIT PETITIONER'S AUTOMOBILE AND PERSONAL PROPERTY WITHOUT INSTITUTING LEGAL FORFEITURE PROCEEDINGS?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

	Page:
Questions Presented	ii
List of Parties	iii
Table of Authorities	v
Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provisions Involved	2
Statement of Case and Facts	3
Reason for Granting the Writ	12
Conclusion	21
Certificate of Service	22
Appendix	23

TABLE OF AUTHORITIES

Case:	Page:
Barrera-Montenegro V. United States, 74 F.3d 657 (5th Cir. 1996)	12
Clymore V. United States, 164 F.3d 569 (10th Cir. 1999)	18, 19
Glasgow V. United States Drug Enforcement Admin., 12 F.3d 795 (8th Cir. 1993)	12, 16, 18
Land V. Dollar, 330 U.S. 731 (1947)	13
Mullane V. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)	12, 13, 14, 15, 17
Robinson V. Hanrahan, 409 U.S. 38 (1972)	14
Slocum V. Mayberry, 15 U.S. (2 Wheat) 1 (1917)	13
Torres V. $36,256.80 U.S. Currency, 25 F.3d 1154 (2d Cir. 1994)	12, 14
United States V. Clark, 84 F.3d 378 (10th Cir. 1996)	16
United States V. Dusenbery, 34 F.Supp.2d 602 (N.D. Ohio 1999)	17
United States V. Dusenbery, 80 F.Supp.2d 744 (N.D. Ohio 2000)	17
United States V. Dusenbery, No. 99-3148 (July 10, 2000)	16
United States V. Giovanelli, 998 F.2d 116 (2d Cir. 1993)	18, 19, 20
United States V. Giraldo, 45 F.3d 509 (1st Cir. 1995)	14, 17, 18
United States V. James Daniel Good Real Property, 114 S.Ct. 492 (1993)	13
United States V. Lee, 106 U.S. 196 (1882)	13
United States V. One Ford Coach, 307 U.S. 219 (1939)	18, 20
United States V. Real Property, 135 F.3d 1312 (9th Cir. 1998)	17
United States V. Rodgers, 108 F.3d 1247 (10th Cir. 1997)	18
United States V. Volanty, 79 F.3d 86 (8th Cir. 1996)	18

TABLE OF AUTHORITIES (Cont'd.)

Case:	Page:
United States V. Woodall, 12 F.3d 791 (8th Cir. 1993)	12, 13, 17
Weng V. United States, 137 F.3d 709 (2d Cir. 1998)	14, 15, 17

RULES

Fed. Crim. R. 41 (e)	3, 4, 5, 6, 10

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000
I. CASE NO. _____

LARRY DEAN DUSENBERY,

PETITIONER,

-VS-

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the District Court is attached at Appendix 4 and cited at 34 F.Supp.2d 602 (N.D. Ohio 1999). The opinion of the United States Court of Appeals for the Sixth Circuit affirming the District Court is attached at Appendix 5. This is a published opinion but Petitioner does not have the cite at the time of this writing. The denial of rehearing or rehearing en banc is attached at Appendix 6.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on July 10, 2000. Rehearing or rehearing en banc was denied on August 25, 2000. The jurisdiction of this Court is invoked under 28 USC Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT:

No person . . . shall be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE AND FACTS

The issue in this case is whether an incarcerated inmate must receive "actual notice" regarding a forfeiture notification, or does the government comply with due process requirements by sending the notice to the inmate's place of incarceration, even if the prisoner may not actually have received notice. The circuits are split on this issue.

Larry Dean Dusenbery (hereinafter "Petitioner"), was arrested on April 23, 1986. The Federal Bureau of Investigation (FBI) kicked in the door at Petitioner's residence and arrested him on a warrant for interstate flight to avoid prosecution. Thereafter, Petitioner pled guilty to a drug charge and was sentenced to twelve (12) years incarceration and a six (6) year term of special parole on July 15, 1986.

During the search of Petitioner's residence at the time of his arrest, FBI agents seized approximately $21,940 in U.S. currency, a 1984 Chevrolet Monte Carlo automobile, and an enormous amount of other miscellaneous property including jewelry, cellular telephones, leather briefcases, pagers, scanners, telephone answering machines, radar detectors, calculators, address books, wallet and clothing. (Appendix 1 at 2).

Thereafter, Petitioner filed a motion for the return of his property pursuant to Federal Criminal Rule 41 (e). (R. 74: motion for return of property). The basis for the motion was that the government had refused to return Petitioner's property or initiate legal forfeiture proceedings.

The government opposed the motion alleging that all property was either returned or forfeited. (R. 85).

Petitioner filed a reply (R. 86) stating the government did not return anything to him nor institute legal forfeiture proceedings.

On May 20, 1994, the court issued an order requesting the government to file a supplemental brief and set forth the factual setting for the factual representations set forth in its response brief. (R. 88).

The government then filed a response on July 19, 1994 (R. 92), declaring all the property that had been seized from Petitioner had been disposed of in some fashion and there was none to return.

On August 1, 1994, Petitioner filed a reply to the government's supplemental response stating that the government's documentation establishes that none of Petitioner's property was returned to him nor did the government institute legal forfeiture proceedings. (R. 93: reply to government supplemental response).

On August 3, 1994, the government filed another supplemental response (R. 94), and Petitioner filed two (2) supplemental reply briefs. (R. 95, 96).

On February 9, 1995, Petitioner moved to supplement his Rule 41 (e) motion to raise a double jeopardy issue. (R. 99).

On February 28, 1995, the court issued an order granting Petitioner leave to file a supplement raising the double jeopardy issue. (R. 100). Additionally, the court requested the government to supplement its response as to why the court should not order Petitioner's funds returned. (R. 100).

On March 15, 1995, the government filed an additional supplemental response (R. 103), and Petitioner filed a supplemental reply. (R. 104).

On April 13, 1995, the court issued an order directing the government to file a supplement response and establish that Petitioner received actual notice of the forfeiture proceedings. Additionally, that the government respond to Petitioner's double jeopardy issue, and given the fact that forfeiture has already occurred, does the court have jurisdiction to entertain Petitioner's motion. (R. 105).

On June 1, 1995, the government filed its response to Petitioner's double jeopardy issue. The government also responded that the court did not have jurisdiction to adjudicate Petitioner's Rule 41 (e) motion, stating Petitioner's action is essentially a habeas corpus proceeding. (R. 109).

On June 16, 1995, Petitioner filed an extensive reply brief setting forth the court's jurisdiction. Petitioner established by law that the court should have construed his motion pursuant to Fed. R. Crim. P. 41 (e) as a civil complaint for equitable relief. Moreover, Petitioner established that the government failed to provide him with proper notice of the forfeiture proceedings which violated his due process rights. Additionally, that the government did not even initiate forfeiture proceedings for a large amount of his property. (R. 110: reply to government's June 1, 1995 response).

On August 23, 1995, the district court assigned the case a civil number. (R. 114).

On October 5, 1995, the district court denied Petitioner's motion in a memorandum opinion declaring the court lacked jurisdiction. (R. 115). A judgment entry was entered on this same date. (R. 116).

Petitioner took a direct appeal to the Sixth Circuit Court of Appeals, and on September 25, 1996, the Sixth Circuit vacated the district court's judgment. (R. 125:

mandate) (Appendix 1). In its opinion, the Sixth Circuit stated that the district court abused its discretion in denying Petitioner's motion for lack of jurisdiction. The Sixth Circuit stated that the district court should have construed Petitioner's Rule 41 (e) motion as a civil action seeking equitable relief. Id.

Moreover, in its mandate pertaining to Petitioner's due process argument, the court stated:

> Therefore, from the evidence in the record, it is not clear that: (1) the certified mail arrived at Milan, (2) a prison employee signed for it, or (3) the notice was ultimately forwarded to Dusenbery through the prison mail system.

Id. at 3. The court ended its opinion with the following mandate:

> Consequently, we remand this case to the district court so it can construe the matter as a civil action seeking equitable relief and determine whether the government provided Dusenbery with "actual notice" of the various forfeitures.

Id. at 4 (emphasis added).[1]

Upon remand the district court opened discovery for a period of ninety (90) days. (R. 126). Thereafter, Petitioner moved to take the telephonic deposition of James Lawson.[2] (R. 132). Both parties then moved for summary judgment. (R. 138, 139).

On July 23, 1997, the district court held an evidentiary hearing on Petitioner's motion for return of property. (R. 147: transcript of evidentiary hearing). Moreover, on this same date Petitioner took the telephonic deposition of James Lawson. (R. 148: telephonic deposition of James Lawson).

---

1 Petitioner was incarcerated at the Federal Correctional Institution (FCI) in Milan, Michigan.
2 James Lawson was a prison mail clerk who worked in the mailroom at FCI Milan.

Prior to the evidentiary hearing, the district court issued a memorandum opinion denying Petitioner's request for the return of his 1984 Chevrolet Monte Carlo, claiming that Petitioner did not have standing to claim said Monte Carlo. (R. 140: memorandum opinion). Petitioner moved for reconsideration (R. 142), but before the district court ruled on the motion, the government conceded that Petitioner had standing to challenge the forfeiture of his 1984 Chevrolet Monte Carlo. (R. 149). Thereafter, the district court denied the reconsideration motion as moot. (R. 145).

At the evidentiary hearing, Petitioner established that the property was his and the government failed to initiate any forfeiture proceedings with respect to all of his personal property. (R. 147). Therefore, the district court ordered the government to compensate Petitioner with respect to his personal property minus 25 percent because the property was used. (R. 147: tr. at 19) (Appendix 2). Additionally, at the hearing, Petitioner admitted that he purchased two of the items listed in his personal property, i.e., item 1, a cellular telephone, and item 9, a realistic pro scanner, with drug proceeds. (R. 147: tr. at 15-16) (Appendix 2 at 15-16). Therefore, the district court ordered the parties to brief the issue as to whether Petitioner should be compensated for those two items. (R. 147: tr. at 20) (Appendix 2 at 20). Moreover, the district court added item 13 (See R. 140: listing of items in memorandum opinion), a gold bracelet, into this category of items to be briefed because of the value of the bracelet. (R. 147: tr. at 20) (Appendix 2 at 20).

On this same day, July 23, 1997, Petitioner took the deposition of James Lawson. (R. 148) (Appendix 3). The purpose of the deposition was to determine whether the

government served Petitioner with notification pertaining to the $21,940 in U.S. currency seized by the FBI.

At the deposition, Mr. Lawson admitted the certified mail receipt, pertaining to the $21,940 in U.S. currency, had an incorrect Post Office box number on it, that it was possible the signature on the receipt could be someone else's, and even if it was Mr. Lawson's signature on the receipt, he could not prove the mail was ultimately forwarded to Petitioner because the institution destroyed all of their log books. (R. 148: tr. of deposition at 6-8) (Appendix 3 at 6-8). Thus, the government could not establish "actual notice" regarding its forfeiture notification pertaining to Petitioner's $21,940 in U.S. currency. Moreover, at the deposition, the government acknowledged it still had possession of Petitioner's 1984 Chevrolet Monte Carlo which could be returned if ordered by the court. (R. 145: order at p. 2, n. 1).

Furthermore, Petitioner acknowledged at the deposition that he may have purchased the 1984 Chevrolet Monte Carlo with drug proceeds but was not certain because the car was purchased, at the time of the deposition, nearly 12 years earlier. (R. 147: tr. pp. 21-22) (Appendix 2 at 21-22). It was Petitioner's position, and still is, that because the government violated Petitioner's due process rights, it lost its opportunity to forfeit the vehicle as purchased with drug proceeds because the statute of limitations expired. Therefore, the government cannot initiate legal forfeiture proceedings. Moreover, at said deposition, the district court took it upon its own, sua sponte, to concede that the vehicle was purchased with drug proceeds. Petitioner did not concede,

he only stated that the vehicle was probably purchased with proceeds. (R. 147: tr. at 22) (Appendix 2 at 22).

Additionally, Petitioner establish in prior proceedings (Appendix 1 at 4), that his 1984 Chevrolet Monte Carlo was seized and forfeited without due process of law. The government sent forfeiture notifications to numerous public residences and to the Portage County Jail. (R. 110: reply at 5). Petitioner was incarcerated at the Federal Correctional Institution in Ashland, Kentucky. The government's August 3, 1994 response indicates that the government only sent notice to the Portage County Jail and not to FCI Ashland where Petitioner was incarcerated. (R. 94: government's August 3, 1994 response). The Sixth Circuit acknowledged this fact in its mandate and the government failed to rebut these facts upon remand. (Appendix 1).

After the evidentiary hearing and deposition of James Lawson, Petitioner moved for the transcript of said proceedings. (R. 151). Upon reviewing the transcripts from both hearings, Petitioner realized the transcripts were incorrect. Therefore, Petitioner moved to correct the transcripts and recuse the district judge. (R. 157, 159). The district court recused itself and the case was reassigned to Judge Gwin. (R. 160, 161).

Thereafter, Judge Gwin scheduled a hearing on the accuracy of the transcripts. (R. 165). Additionally, all parties submitted their supplemental briefs. (R. 150, 152, 154, 158). Moreover, Petitioner filed two additional supplemental briefs based on new case law (R. 173, 176), the government filed a response thereto (R. 174), and Petitioner filed a reply. (R. 175).

At the evidentiary hearing Judge Gwin ruled that the transcripts were accurate after refusing to allow Petitioner to subpoena James Lawson in order to question him pertaining to his testimony taken at the time of his deposition. The court took judicial notice that Lawson was outside the reach of subpoena jurisdiction. (R. 184: tr. of hearing).

On January 19, 1999, the district court denied Petitioner's Rule 41 (e) motion for the return of his property by granting the government's summary judgment motion and denying Petitioner's motion for summary judgment. (R. 180, 181: opinion and order) (Appendix 4). The district court ruled, contrary to the Sixth Circuit's mandate (Appendix 1), that the government was not required to establish "actual notice" regarding the forfeiture notifications in this case. (Appendix 4 at 6-8), published at 34 F.Supp.2d 602 (N.D. Ohio 1999). Moreover, the court ruled that Petitioner was not entitled to the return of his 1984 Monte Carlo, regardless of the fact that there was not any legitimate forfeiture proceedings before the court for the court to order forfeiture under because the government violated Petitioner's due process rights regarding notification, therefore, the forfeiture was void. (Appendix 4 at 8-13). Finally, the court denied Petitioner compensation for his personal property, regardless of the fact that Judge Dowd already ordered Petitioner compensated (Appendix 2 at 19), and Judge Dowd's ruling was the "law of the case." Id. Furthermore, there was not any legitimate forfeiture proceedings before the court regarding Petitioner's personal property. Therefore, the district court was without jurisdiction to do anything but order the property returned, Petitioner compensated, or order the government to initiate legal forfeiture proceedings. The

government could not initiate legal forfeiture proceedings because the statute of limitations had expired.

On July 10, 2000, the Sixth Circuit affirmed the district court's ruling. (Appendix 5). A petition for rehearing or rehearing en banc was also denied. (Appendix 6). Petitioner now moves for certiorari in this court.

REASON FOR GRANTING THE WRIT

I. SHOULD THIS COURT GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER A PRISONER MUST RECEIVE "ACTUAL NOTICE" REGARDING A FORFEITURE NOTIFICATION?

In Mullane V. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), this court held that notice must be "reasonably calculated, under all the circumstances to appraise interested parties of the action and afford them an opportunity to present their objections." Id. at 314.

In forfeiture proceedings, in addition to at least three weeks of publication of the intention to forfeit, "[w]ritten notice . . . shall be sent to each party who appears to have an interest in the seized article." 19 USC Section 1607 (a); Torres V. $36,256.80 U.S. Currency, 25 F.3d 1154, 1160 (2d Cir. 1994). Notice by publication is inadequate when the government has in its possession information which would enable it to affect actual notice on an interested party of the pending forfeiture. See Barrera-Montenegro V. United States, 74 F.3d 657, 660 (5th Cir. 1996); United States V. Woodall, 12 F.3d 791, 794 (8th Cir. 1993) (notice sent to incorrect address was unreasonable when DEA had actual knowledge of party's whereabouts). The "claimant's right to compel the agency to proceed by judicial forfeiture is an important statutory check on the government's power to forfeit private property. Therefore, the government's compliance with statutory and constitutional notice requirements are essential components of the statutory regime." Glasgow V. United States Drug Enforcement Admin., 12 F.3d 795, 797 (8th Cir. 1993).

The federal courts have universally upheld jurisdiction to review whether an administrative forfeiture satisfied statutory and due process requirements. Judicial review

is a fundamental safeguard against government agencies and public officials who wrongfully seize or hold a citizen's property. See Land V. Dollar, 330 U.S. 731, 738 (1947); United States V. Lee, 106 U.S. 196, 220-21 (1882). Rigorous judicial review of forfeitures began at least as early as Slocum V. Mayberry, 15 U.S. (2 Wheat) 1, 10 (1917) (Marshall, C. J.), and continues today. See United States V. James Daniel Good Real Property, 114 S. Ct. 492 (1993). Under the Tarrif Act, the statutory right to compel an agency to proceed by judicial condemnation is a vital congressional restraint on arbitrary confiscations. Yet, as in other adjudicatory settings, this right "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Mullane, 339 U.S. at 314. Judicial review of this due process issue is therefore essential. United States V. Woodall, 12 F.3d 791, 793 (8th Cir. 1993).

When the government is incarcerating or prosecuting a property owner when it elects to proceed with a forfeiture proceeding of his property, the government has the duty to locate that person in the prison system and properly serve him with notice of the pending forfeiture proceeding in order to give the individual an opportunity to contest the forfeiture. See Woodall, 12 F.3d at 794-95:

> [I]f the government is incarcerating or prosecuting the property owner when it elects to impose the additional burden of defending a forfeiture proceeding, fundamental fairness surely requires that either the defendant or his counsel receive actual notice of the agency's intent to forfeit in time to decide whether to compel the agency to proceed by the judicial condemnation.

Also see Robinson V. Hanrahan, 409 U.S. 38, 40 (1972) (per curiam) (the state violated defendant's right to due process by mailing a notice of forfeiture to defendant's home

when it knew that he was in jail). Thus, where a claimant is "residing at a place of the government's choosing," the seizing agency must take steps to locate the claimant and send notice to the proper address in order to satisfy due process. Torres, supra at 1161 (a "simple call" to the Bureau of Prisons often suffices to determine where a claimant is serving his or her sentence); United States V. Giraldo, 45 F.3d 509, 511 (1st Cir. 1995). A simple telephone call would also lead the government to the correct mailing address.

In Weng V. United States, 137 F.3d 709, 712-715 (2nd Cir. 1998), the Second Circuit ruled that pursuant to Mullane, supra, the due process clause requires more than just proof that the forfeiture notification arrived at the institution where the inmate is incarcerated. The court stated that because the property owner is entirely dependent on the institution to deliver his mail to him, fundamental fairness requires the government to show that the owner received actual notice of the proceedings himself. As stated by the Second Circuit, "[w]e do not agree that a federal agency's mailing of a notice of forfeiture to a federal correctional institution where the property owner is detained constitutes adequate notification of the forfeiture if the notice is not in fact delivered to the prisoner-owner." Weng, 137 F.3d at 714 (emphasis added). "[T]he mere mailing of notice—even with a required return receipt signed not by the addressee but by the institution—does not satisfy the requirement of Mullane that the means of giving notice 'be such as one desirous of actually informing [the owner] might reasonably adopt.'" Id. at 715 (quoting Mullane, 339 U.S. at 315).

Moreover, the court stated, "when [a governmental agency] wishes to secure such a prisoner's cooperation in testifying against some important wrongdoer, it has no

difficulty in delivering the message in a manner that insures receipt." Weng, 137 F.3d at 715. In contrast, the giving of notice merely by sending a letter to the prisoner's jail is suspect for two reasons. "First, as a prisoner, the owner is unable to insure that he will receive the notice once the post office has delivered it to the institution. The owner is entirely dependent on the institution to deliver his mail to him." Id. Furthermore, "because the owner's jailer—the Bureau of Prisons—is part of the same government . . . as the agency seeking to give notice, the forfeiting agent can in all probability secure the Bureau's cooperation in assuring that the notice will be delivered to the owner." Id. Thus, the Second Circuit requires that a reliable record of the delivery to the inmate be created. Weng, at 715.

In this case, the government did not provide Petitioner with constitutionally adequate notice regarding his $21,940 in U.S. currency. Therefore, Petitioner did not receive the forfeiture notification and was unable to object to the forfeiture of his funds. First of all, the government sent notice to the wrong Post Office Box number. (Appendix 1 at 3). The address at the prison where Petitioner was at—FCI Milan—is P. O. Box 1000. The government sent notice to P. O. Box 100. (Appendix 3 at 6-8). Moreover, James Lawson—the prison mail clerk—admitted it was possible the signature on the certified mail receipt could be someone else's. (Appendix 3 at 6-8). Additionally, the certified mail receipt has an illegible signature. (Appendix 1 at 3). Furthermore, even if it was Mr. Lawson's signature on the certified mail receipt, Mr. Lawson stated he could not prove the mail was ultimately forwarded to Petitioner because the institution destroyed all of their log books. (Appendix 3 at 6-8). Finally, although the government published

notice in the Cleveland Plain Dealer in Cleveland, Ohio, Petitioner was incarcerated in Milan, Michigan and certainly was not going to see a publication in an Ohio newspaper. (Appendix 1 at 3). The government knew Petitioner was incarcerated in Michigan because the government prosecuted Petitioner and put him there. Thus, the Sixth Circuit's opinion is in error. The forfeiture is void and Petitioner's funds should be returned to him because the statute of limitations has expired for the government to initiate legal forfeiture proceedings. See Glasgow V. United States Drug Enforcement Admin., 12 F.3d 795, 799 (8th Cir. 1993) (administrative forfeiture void due to defective notice; case remanded to vacate forfeiture and to order DEA either to return the property or initiate judicial forfeiture proceedings).

In addition to the above, there is a split in the circuits as to this issue. The Sixth, Ninth, and Tenth Circuits find that the government complies with due process requirements by sending a forfeiture notification to the inmate's place of incarceration, even if the prisoner may not actually have received the notice. See United States V. Dusenbery, No. 99-3148 (July 10, 2000) (this court does not require the government to show that the mail actually reached an inmate in order to satisfy requirements of due process) (Appendix 5 at 4); United States V. Clark, 84 F.3d 378, 381 (10th Cir. 1996) (concluding that government complied with due process requirements when it sent notice by certified mail to prison where claimant was incarcerated, even if claimant may not actually have received notice); United States V. Real Property, 135 F.3d 1312, 1315-16 (9th Cir. 1998) (same). The First, Second, and Eighth Circuits find that a corrections officer's signature is less than reliable assurance that the incarcerated property owner has

received actual notice. See Weng V. United States, 137 F.3d 709, 714-715 (2d Cir. 1998) ("[w]e do not agree that a federal agency's mailing of a notice of forfeiture to a federal correctional institution where the property owner is detained constitutes adequate notification of the forfeiture if the notice is not in fact delivered to the prisoner-owner. . ." "[T]he mere mailing of notice—even with a required return receipt signed not by the addressee but by the institution—does not satisfy the requirement of Mullane that the means of giving notice 'be such as one desirous of actually informing [the owner] might reasonably adopt.'"); United States V. Giraldo, 45 F.3d 509, 511 (1st Cir. 1995) (If the government is incarcerating or prosecuting the property owner when it elects to impose the additional burden of defending a forfeiture proceeding, fundamental fairness surely requires that either the defendant or his counsel receive "actual notice" of the agency's intent to forfeit in time to decide whether to compel the agency to proceed by judicial condemnation); United States V. Woodall, 12 F.3d 791, 794-95 (8th Cir. 1993) (same).

Additionally, several district courts are split on this issue. Compare United States V. Dusenbery, 34 F.Supp.2d 602 (N.D. Ohio 1999) (mail need not actually reach inmate in order to satisfy requirements of due process), with United States V. Dusenbery, 80 F.Supp.2d 744 (N.D. Ohio 2000) (inmate must actually receive notice in order to satisfy requirements of due process).

The forfeiture statutes give the government vast and important powers, but they must be exercised in the precise manner the statutes provide. Forfeitures should only be enforced if they fall within both the letter and spirit of the law. United States V. One Ford

Coach, 307 U.S. 219, 226 (1939); United States V. Giovanelli, 998 F.2d 116 (2d Cir. 1993).

Because there is a split among the circuits regarding this important Federal question, this court should grant certiorari, reverse the lower court, and order Petitioner's funds returned to him.

II. CAN THE GOVERNMENT FORFEIT PETITIONER'S AUTOMOBILE AND PERSONAL PROPERTY WITHOUT INSTITUTING LEGAL FORFEITURE PROCEEDINGS?

The government confiscated Petitioner's 1984 Chevrolet Monte Carlo without providing Petitioner with due process of law. This was established in prior proceedings. (Appendix 1 at 4). Thus, the forfeiture is void. See United States V. Giraldo, 45 F.3d 509, 512 (1st Cir. 1995) ("If the notice turns out to have been inadequate, the forfeiture is void."); United States V. Rodgers, 108 F.3d 1247, 1255 (10th Cir. 1997); Clymore V. United States, 164 F.3d 569, 572 (10th Cir. 1999). Therefore, the district court could only order the automobile returned or direct the government to initiate judicial forfeiture proceedings. United States V. Volanty, 79 F.3d 86, 88 (8th Cir. 1996) (noting that "[w]hen an administrative forfeiture is void for lack of notice, a district court must set aside the forfeiture declaration and order DEA either to return [the] property or commence judicial forfeiture in the district court."); Glasgow V. United States Drug Enforcement Admin., 12 F.3d 795, 799 (8th Cir. 1993). Moreover, the five-year statute of limitations expired, therefore, the government is precluded from initiating judicial forfeiture proceedings. See Clymore V. United States, 164 F.3d 569, 572-574 (10th Cir. 1999).

The Sixth Circuit ruled that because Petitioner stated during an evidentiary hearing that the 1984 Monte Carlo may have been purchased with drug proceeds, the district court did not have to order the automobile returned. (Appendix 5). This ruling is in error. The district court did not have jurisdiction to do anything but order Petitioner's vehicle returned to him or direct the government to initiate judicial forfeiture proceedings because there was absolutely no forfeiture proceedings before the court. Because the five-year statute of limitations expired (See Clymore, supra), the district court's only option was to direct the government to return Petitioner's vehicle. The government lost its opportunity to forfeit the vehicle as drug proceeds when it failed to initiate legal forfeiture proceedings. See United States V. Giovanelli, 998 F.2d 116 (2d Cir. 1993).

Additionally, as to Petitioner's personal property, the government did not initiate any forfeiture proceedings. (Appendix 1 at 4). Therefore, Petitioner should have been compensated for the destruction of his personal property because the dis' .ct court was without jurisdiction to order it forfeited.

Moreover, there is an error in the Sixth Circuit's ruling. The court's ruling states that Petitioner admitted that he purchased all of his personal property with drug proceeds. This is incorrect. Petitioner only claimed to have purchased two items with drug proceeds. The transcript states:

> THE COURT: Well, what was bought by drug money and what wasn't bought by drug money?
>
> Can you go through the listing and indicate that to me? When you say "drug money," you mean the proceeds from the sale of drugs contrary to law?
>
> MR. DUSENBERY: Yes.

> THE COURT: All right.
>
> MR. DUSENBERY: The Cellular One Telephone.
>
> THE COURT: Well, why don't you just number them by the number.
>
> MR. DUSENBERY: Number 1.
>
> THE COURT: Okay.
>
> MR. DUSENBERY: Number 9, Realistic Pro Scanner. I believe that's all.

(Appendix 2 at 15-16). The government lost its opportunity to forfeit Petitioner's personal property as drug proceeds when it failed to initiate forfeiture proceedings. See United States V. Giovanelli, 998 F.2d 116 (2d Cir. 1993) (The forfeiture statutes impose no duty on a defendant to prevent the government from losing its rights through carelessness). The government cannot justify retroactive destruction of the property. How the property was obtained is irrelevant. If the government wanted to obtain forfeiture of said property as drug proceeds, it had to follow the proper channels established by Congress through the forfeiture statutes. See United States V. One Ford Coach, 307 U.S. 219, 226 (1939) (The forfeiture statutes give the government vast and important powers, but they must be exercised in the precise manner the statutes provide). Here, the government did not exercise the statutes at all.

Because the government has taken Petitioner's automobile and personal property without instituting legal forfeiture proceedings, this Court should grant certiorari, reverse the lower court, order Petitioner's automobile returned and compensation for his personal property.

00-6557

CONCLUSION

Because of the split in the circuits and the important Federal question regarding Petitioner's automobile and personal property, the Petition for A Writ of Certiorari should be granted.

Respectfully submitted,

Larry Dean Dusenbery
Petitioner in pro per
Reg. No. 50908-060
U. S. P. Allenwood
P. O. Box 3000
Whitedeer, PA 17887

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing this 3rd day of October, 2000, was served upon the following:

Office of the Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Supreme Court, U.S.
FILED
OCT 16 2000
OFFICE OF THE CLERK

Larry Dean Dusenbery

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

SEP 25 1996

LEONARD GREEN, Clerk

LARRY DEAN DUSENBERY,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ORDER

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
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Before: GUY, RYAN, and MOORE, Circuit Judges.

Larry Dean Dusenbery appeals a district court order denying his motion for return of property filed pursuant to Fed. R. Crim. P. 41(e). The case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In 1993, Dusenbery filed his Rule 41(e) motion, requesting the return of property seized by the Federal Bureau of Investigation (FBI) in April 1986. The district court determined that it lacked jurisdiction to entertain Dusenbery's motion because a Rule 41(e) motion was not the proper remedy for seeking return of his property. Consequently, the court denied the motion. Dusenbery has filed a timely appeal.

Upon review, we determine that the district court improperly concluded that it lacked jurisdiction to consider Dusenbery's Rule 41(e) motion. This court reviews a district court's

Appendix 1.

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determination that it lacked jurisdiction to consider a Rule 41(e) motion for an abuse of discretion. *See Frazee v. Internal Revenue Serv.*, 947 F.2d 448, 449 (10th Cir. 1991).

The district court abused its discretion in denying Dusenbery's motion for lack of jurisdiction. In his Rule 41(e) motion, Dusenbery alleged that the defendant forfeited his property without giving him adequate notice of the forfeiture. While the district court concluded that it lacked jurisdiction because Dusenbery had not followed the procedures for seeking judicial relief set forth in the forfeiture statute and regulations, Dusenbery argues that he was unable to comply with these procedures because he never received notice of the forfeiture of his property.

Since Dusenbery was raising a due process challenge to the forfeiture, the district court had jurisdiction to consider his claims. While most judicial challenges to a forfeiture are foreclosed by the plaintiff's failure to use the mechanism provided in the forfeiture statute and regulations, the federal courts have jurisdiction to entertain collateral due process attacks on administrative forfeitures, including challenges to the adequacy of notice. *United States v. Giraldo*, 45 F.3d 509, 511 (1st Cir. 1995) (per curiam); *Toure v. United States*, 24 F.3d 444, 445-46 (2d Cir. 1994) (per curiam); *United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1993). Although Dusenbery cannot pursue his claim in a Rule 41(e) motion because criminal proceedings against him have been completed, the district court should have construed his motion as a civil complaint seeking equitable relief. *Thompson v. Covington*, 47 F.3d 974, 975 (8th Cir. 1995) (per curiam); *Giraldo*, 45 F.3d at 511; *Toure*, 24 F.3d at 445.

Additionally, in order to assist the district court upon remand, we make several comments concerning the current state of the record. The record reveals that, in April 1986, the FBI conducted a search of Dusenbery's trailer in Atwater, Ohio and seized $21,940, a 1984 Chevrolet Monte Carlo, and a large number of Dusenbery's personal items. The government acknowledges that it subsequently forfeited this property as proceeds of drug trafficking. Although Dusenbery argues that he was not aware of these forfeiture proceedings, the government submits that it provided Dusenbery with adequate notice of the forfeiture of his property.

Before the government forfeits property, due process requires that the government provide notice which is reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Giraldo*, 45 F.3d at 511. Further, if the government is incarcerating a property owner when it elects to pursue a forfeiture action against his property, fundamental fairness requires that the defendant receive actual notice of the agency's attempt to forfeit. *Id.*; *Woodall*, 12 F.3d at 794-95. The government cannot assert that it was unaware of a property owner's location when he is incarcerated in a federal facility. *See Torres v. $36,256.80 U.S. Currency*, 25 F.3d 1154, 1160-61 (2d Cir. 1994).

The evidence presently in the record does not appear to support the government's contention that Dusenbery had actual notice of his currency's forfeiture. The government provided evidence that, in November 1988, it sent notice of the forfeiture to three separate locations. One notice was mailed to Dusenbery's home in Atwater, Ohio; however, this certified mail was returned unclaimed. A second notice was mailed to Dusenbery at a residence in Randolph, Ohio; while this certified mail was signed for by an Edward Clouse, no evidence exists in the record concerning Clouse's relationship with Dusenbery or if Clouse ultimately provided this notice to Dusenbery. The third notice was sent to Dusenbery at the Federal Correctional Institution (FCI) in Milan, Michigan. While it is undisputed that Dusenbery was incarcerated at FCI Milan during this time, he notes that the certified mail gives an inaccurate P.O. Box for the facility. Further, the certified mail receipt contains an illegible signature. The government has not provided any additional evidence attempting to show who signed for the letter or the standard procedure for processing such a letter once it arrived at the facility. Therefore, from the evidence in the record, it is not clear that: 1) the certified mail arrived at Milan, 2) a prison employee signed for it, or 3) the notice was ultimately forwarded to Dusenbery through the prison mail system. Lastly, the government did publish notice of the forfeiture in the Cleveland Plain Dealer on three separate occasions. However, as the government knew or should have known that Dusenbery was incarcerated at FCI Milan, it is not clear that publication in an Ohio newspaper was sufficient to provide Dusenbery with notice.

The evidence supporting the notice provided by the government for the forfeiture of Dusenbery's Monte Carlo appears even more attenuated. First, the government mailed notices to Dusenbery in Randolph, Ohio and Atwater, Ohio, although the record does not reflect that anyone received and signed for this certified mail. Second, the government mailed notice to Alma Dusenbery, but the record does not reflect her relationship to Dusenbery nor does it show that she actually received this notice. Third, the government sent notice to Dusenbery at the Portage County Jail in January 1987, but the record again does not contain any signature on certified mail demonstrating receipt of this notice. Further, Dusenbery submits that he was not located at the Portage County Jail during this time but was rather incarcerated at the FCI in Ashland, Kentucky. Lastly, the government again published notice of the forfeiture on three separate occasions in the Cleveland Plain Dealer, which appears insufficient to provide notice for a prisoner incarcerated in another state.

We also note that the government has not provided any evidence that it gave Dusenbery notice of the forfeiture of his personal property. Consequently, we remand this case to the district court so it can construe the matter as a civil action seeking equitable relief and determine whether the government provided Dusenbery with actual notice of the various forfeitures.

Accordingly, this court vacates the district court's judgment and remands this case for further proceedings. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LARRY DEAN DUSENBERRY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Case No. 5:95CV1872
86CR0102

Akron, Ohio
Wednesday, July 23, 1997
7:55 a.m.

TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE DAVID D. DOWD
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Larry Dean Dusenberry

For the Defendant: Herbert J. Villa
James L. Morford
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Youngstown, Ohio 44503
(330) 747-8754

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

Appendix 2

Caroline Mahnke, RMR

THE COURT: The court calls the case of Larry Dusenberry versus United States of America. The case number is 5:95CV1872. It grows out of criminal case 86CR0102. The case has a number of issues that relate to the forfeiture and seizure of property.

The plaintiff contends that the currency seized from him in the sum of $21,940 was improperly forfeited out of due process of law. He has a claim involving a 1984 Chevrolet Monte Carlo which the court has already ruled on. And what brings us here today is the third claim that personal property of the defendant was destroyed by the government without any forfeiture proceedings.

Both parties have filed motions for a summary judgment. The government has conceded by the affidavit of Steven Pyles, filed as Appendix 2 to the Court's order of May 29, 1997, that all personalty which had been seized from Mr. Dusenberry, after his criminal trial had been concluded was abandoned or destroyed as evidence. But there was no forfeiture proceeding.

Mr. Dusenberry has listed what he considers to be the property that was taken from him together with the values for that property, and the court has scheduled for today an evidentiary hearing to give Mr. Dusenberry the opportunity to give testimony, A, as to the fact that he was the owner of the property, and B, to offer testimony as to the value

of the property, give the government the opportunity to cross-examine him.

And so I believe, Mr. Dusenberry, if you're prepared to testify, I will permit you to do so. Do you wish to come forward, take the oath and testify?

MR. DUSENBERRY: Yes, your Honor.

THE COURT: Do you have a file you need to assist you in that?

MR. DUSENBERRY: Yes.

THE COURT: Would you come forward, please. I'm going to have you testify, so it's clear that you're testifying, so we'll use the witness stand.

MR. DUSENBERRY: Your Honor, could I have a pen?

THE COURT: Sure.

MR. DUSENBERRY: The one matter, before I take the stand, I filed a motion for reconsideration on a 1984 Monte Carlo. Has the court received that?

THE COURT: I am aware of that. I received it and I'm going to deny it. But right now we are not going to talk about that. What we are going to talk about is the property.

LARRY DEAN DUSENBERRY,

of lawful age, the Plaintiff herein, being first duly sworn, was examined and testified as follows:

THE COURT: Now, I would ask that you testify as

follows: Start out by saying "question," then describe the question, and then say "answer" and give the answer so that it will be clear what's the question and what's the answer for the purpose of the record and also to give the government attorneys the opportunity to object if they want to object to the question.

Do you follow me? Do you have any questions about the procedure I just outlined?

MR. DUSENBERRY: Well, in my -- I'm not sure what I'm doing here. I mean, am I going to -- are they going to question me first?

THE COURT: No, no. You're going to offer testimony as to, as I understand -- do you have a copy of the opinion, the May 29, 1997 opinion of the Court?

MR. DUSENBERRY: Yes.

THE COURT: Go get that. Maybe that will help you.

Now, if you'll turn to the bottom of page 2 where it says: "Mr. Dusenberry contends that the following list of property was seized by the government and no forfeiture proceedings were initiated. The list, together Mr. Dusenberry's opinion as to the value, follows." And then you will see on the next page is the list.

MR. DUSENBERRY: Yes.

THE COURT: Now, the government is not prepared to

concede, A, that those items listed, 1 through 17, were owned by you nor are they prepared to concede as to the values. And the purpose of the hearing today is for me to decide what in fact belonged to you and what the values are and enter judgment in that amount.

MR. DUSENBERRY: Okay.

THE COURT: So I think the first thing is: Question, what is your name. Answer, Larry Dean Dusenberry. Then go on.

DIRECT EXAMINATION OF LARRY DEAN DUSENBERRY

BY MR. DUSENBERRY:

Q. What is your name?

A. My name is Larry Dean Dusenberry.

Q. Did the property seized in April 1986, was it seized from your residence?

A. Yes.

Q. Was the property yours?

A. Yes.

Q. Was you in possession and control of the property?

A. Yes.

Q. Was anyone else in the residence?

A. No.

Q. Did anybody else own the residence?

A. No.

Q. Was you in complete possession and control of the

property?
A. Yes.
THE COURT: Let me interrupt. Does the government concede that the list of the property as set forth in the opinion on page 3 is an accurate list of that which was seized without regard to the value?
MR. VILLA: Yes, it does, your Honor.
THE COURT: Thank you.
I think now, Mr. Dusenberry, it would be helpful if you would just go, starting with number 1, and indicate when you purchased it, what you paid for it and how you arrived at that value. And just go through the whole list.
The first is the cellular telephone.
BY MR. DUSENBERRY:
Q. When did you purchase the Cellular One, audio tel, telephone contained in a brown leather briefcase?
A. Sometime in 1986.
Q. How much did you pay for the cellular telephone?
A. $1,500.
Q. Do you have the receipts for these?
A. No. The FBI seized the receipts and all other property at the time that they took all the property and destroyed them along with the other property.
THE COURT: This was seized in '86, was it, Mr. Dusenberry?

MR. DUSENBERRY: Yes.
THE COURT: Thank you.
BY MR. DUSENBERRY:
Q. Was one black leather briefcase seized?
A. Yes, sir.
THE COURT: I think it's conceded, so I think you can just go to values now.
MR. DUSENBERRY: Okay.
BY MR. DUSENBERRY:
Q. How much did you pay for the one black leather briefcase?
A. $120.
Q. When?
THE COURT: When did you buy it, Mr. Dusenberry?
MR. DUSENBERRY: I purchased the brief case approximately January of 1986.
THE COURT: Thank you.
BY MR. DUSENBERRY:
Q. Was one mobile-comm pager seized?
A. Yes.
Q. How much was it purchased for -- how much was its value?
A. Approximately $100.
Q. Was one duefone telephone answering system seize
THE COURT: May I interrupt? What does '

phrase "duefone" mean? I'm unfamiliar with that phrase.

MS. DUSENBERRY: I'm not sure, your Honor. It was listed on the inventory sheet as that.

THE COURT: Okay.

BY MR. DUSENBERRY:

Q. One black leather bag.

THE COURT: Well, wait a minute. Let's go back to the telephone answering system. Did you purchase that?

MS. DUSENBERRY: Yes.

THE COURT: From whom did you purchase it, if you can remember?

MS. DUSENBERRY: Well, I purchased it from some retail store.

THE COURT: Okay. All right, go ahead.

BY MR. DUSENBERRY:

Q. One black leather bag?

A. It was a small leather bag with a strap on it, and I paid approximately $25 for it sometimes in 1985.

Q. One realistic pro scanner. Value 175?

THE COURT: That's pro-30 scanner.

A. Value $175. And most of this property was seized back when the value of these items were set at approximately how I have them set here because the cellular telephones and scanners and whatnot, the price had went down since that time. But at that time they was a higher value. This was,

like, the first telephone in the briefcase that was made at that time. That's why the value was $1,500. And I purchased it at Cellular One.

Q. One Radio Shack antenna for cellular mobile telephone adapter.

A. It was purchased at Radio Shack, and the value was $150 in 1986.

Q. One leather -- one gray leather coat?

A. It was purchased at Bermann's in Chappel Hill Mall, and I paid $150 for it in 1986.

Q. One realistic pro-2003 scanner, value $200?

A. It was purchased in 1986 at Radio Shack.

Q. One brown address book, value $15?

A. I'm not sure where I purchased it. I purchased it in late 1985 or 1986.

THE COURT: It cost $15 for an address book?

MS. DUSENBERRY: Yes, it was a big leather address book.

THE COURT: All right.

BY MR. DUSENBERRY:

Q. One Radio Shack telephone remote control; value $35?

A. It was purchased at Radio Shack in 1985.

Q. One calculator?

A. I estimated that value. I don't know where I bought it. I will agree to $10.

THE COURT: All right.

BY MR. DUSENBERRY:

Q. One gold bracelet.

A. I purchased that on East Market Street. I don't know the name of the store. But I paid $1,500 for it in 1986, approximately February.

Q. One whistler radar detector, number 302650, value $350.

A. I believe it was purchased at Radio Shack in late 1985, December, just before Christmas.

Q. One executive memo notebook, value $25.

A. Again, I estimated that. I will concede to $15.

Q. One tel-address J.R. address/notebook; value $20?

A. I can't remember where I purchased it or when I purchased it, but it was a leather notebook. I estimate it at $20.

Q. One leather wallet; value $40?

A. I'm not sure where I purchased that either.

THE COURT: Okay. Does that complete your testimony on direct as to the values?

MS. DUSENBERRY: Yes.

THE COURT: You may cross-examine.

MR. VILLA: Thank you, your Honor.

CROSS-EXAMINATION OF LARRY DEAN DUSENBERRY

BY MR. VILLA:

Q. Mr. Dusenberry, my name is Herbert Villa. I am an Assistant United States Attorney.

Just for your information, the other two gentlemen at the table, this is James Morford. He is also an assistant United States attorney, the gentleman in the blue suit. The gentleman in the light sport jacket is named Steven Pyles, and he is an FBI paralegal specialist.

I've listened to your testimony. Do you have any evidence other than your word that this property is actually owned by you or was owned by you in 1986?

A. My answer to that is I was in possession and control of the property.

Q. You may have been in possession and control, but were you the owner?

A. Yes.

Q. And do you have any evidence to substantiate that?

A. My evidence is that I was in the house and I was in possession.

Q. But I mean, for example, did you --

A. Any receipts I have was destroyed by the FBI when they seized the property when they destroyed the other property.

Q. Was any of this property purchased on credit cards?

A. No, sir.

Q. It was purchased by cash?

A. Yes.

Q. And where did the cash come from?
A. It came from me.
Q. Were you employed?
A. No.
Q. Where did the cash come from them?
A. From selling drugs.
Q. Selling drugs. You originally filed, and you correct me if I'm wrong, a Rule 41(e) motion for return of property?
A. Yes.
Q. And that is the context in which we are here today?
A. Correct.

MR. VILLA: Now, your Honor, may I approach the witness?

THE COURT: Sure.

BY MR. VILLA:

Q. Would you please identify for the court what I've just handed you?
A. This is an -- I believe it's a Motorola flip phone.
Q. It's an ad for a Motorola flip phone?
A. Yes, this is a -- what's the date on this? 1997?
Q. It's an ad in the Cleveland Plain Dealer?
A. Yes.
Q. And what is the month?
A. This is June 6, 1997.
Q. Right, and it's an ad for a Motorola flip telephone?

A. Yes.
Q. And how much are they willing to sell the flip telephone to the public for?
A. I guess if you purchase the cell time, you get it for a dollar.
Q. One dollar for the telephone.

I would like to hand you another piece of paper.

THE COURT: Mr. Villa, I could take you back when my son went on to college, and my son himself who was a mathematician at the time, wanted a calculator. We bought him a calculator, a little calculator, paid $200 for it. Now, they give them away. I mean, that happened.

MR. VILLA: That's exactly my point, your Honor.

THE COURT: The question here is what are the values in '86; not what the values are in '97.

MR. VILLA: Your Honor, I respectfully would ask you to reconsider that statement. The context of this case is to return the property to him.

THE COURT: Well, you've destroyed the property.

MR. VILLA: We did destroy the property. However, your Honor, the property today, if we did return it to him, it's not worth $1,500. It's worth one penny. If we destroyed the property, and I say, here, Mr. Dusenberry, the government was wrong, it destroyed this particular cell phone but I will give you an identical cell phone, an

identical cell phone, it would cost the government one penny to get that cell phone, your Honor. It's not $1,500. It's one penny.

THE COURT: Well, put a question now and we will have argument later.

I wanted to point out to you that I am well aware of the fact that values changed over the years, and especially with respect to calculators and things of that sort.

Now, I'm not a cellular telephone devotee. I have no working knowledge in that area. And if you want to produce testimony about what those telephones are worth back at the time you seized it and did not return it, I will be glad to entertain that. In the meantime, cross-examine the witness.

MR. VILLA: Your Honor, I don't have any further questions of the witness.

THE COURT: Thank you.

Anything further, Mr. Dusenberry?

MR. DUSENBERRY: No, your Honor.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Does the government wish to produce any testimony?

MR. VILLA: No, your Honor.

THE COURT: Very well. The court will take the matter under advisement.

Do you wish to brief the issue, Mr. Villa?

MR. VILLA: I don't think that's necessary either, your Honor.

THE COURT: All right.

Mr. Dusenberry, I would like to ask a couple questions of you. You can just handle it there at the trial table. You don't need to come back up.

You indicated in response to one of Mr. Villa's questions that you didn't have any -- that the source of the money for at least one of the purchases is drug money.

Is it your position that all these items were bought by drug money?

MR. DUSENBERRY: Yes, your Honor.

THE COURT: Well, what was bought by drug money and what wasn't bought by drug money?

Can you go through the listing and indicate that to me? When you say "drug money," you mean the proceeds from the sale of drugs contrary to law?

MS. DUSENBERRY: Yes.

THE COURT: All right.

MR. DUSENBERRY: The Cellular One telephone.

THE COURT: Well, why don't you just number them by the number.

MR. DUSENBERRY: Number 1.

THE COURT: Okay.

MR. DUSENBERRY: Number 9, realistic pro scanner. I believe that's all.

THE COURT: The pager, number 3 --

MR. DUSENBERRY: Your Honor, I'm not sure, it's been so long ago, and I was -- you know, most of my money came from that source at that time.

THE COURT: When was the last time you worked?

MR. DUSENBERRY: I hadn't worked since 1983.

THE COURT: What did you do then?

MR. DUSENBERRY: Well, 1983, '82, '83 I went to prison. '81 and '82 I worked at a bakery, and I worked for another individual helping him remodel houses. And that was the last time I've worked. I was in prison in '83 and '84. Then I was released in '84 and went back in 1986 on this case.

THE COURT: What were you convicted of in the case before me? I have no recollection of that.

MR. DUSENBERRY: It was a bank fraud -- in the 1983 case?

THE COURT: No, the case in front of me.

MR. DUSENBERRY: Oh, this was for cocaine, one kilo of cocaine.

THE COURT: And then how long -- well, of course it doesn't make any difference how long you were in prison after that.

MR. DUSENBERRY: I've never been out.

THE COURT: All right. Let's focus on 13. You say you bought that at someplace here in Akron?

MR. DUSENBERRY: Yes.

THE COURT: That's a lot of money for a gold bracelet. I mean, I'm not into gold, but can you be a little more -- can you elaborate a little bit more than that.

MR. DUSENBERRY: It was a nugget bracelet.

THE COURT: And you bought that not with drug money.

MR. DUSENBERRY: Well, I can't say for sure.

THE COURT: Do you know when you bought it?

MR. DUSENBERRY: I bought it around Christmastime of '85.

THE COURT: It was for your own use?

MR. DUSENBERRY: Yes.

THE COURT: Thank you, Mr. Dusenberry.

MR. DUSENBERRY: Thank you.

THE COURT: I believe for appellate purposes, the court needs to make fact findings.

The court finds that the defendant is entitled to the value of the property at the time it was seized and not returned.

The government is not entitled to take the benefit of

the fact that the property later decreased in value any more than the defendant would be allowed to take the position that it somehow increased in value. The value, it seems to me, should be set at the time of the seizure or at least at the time the government failed to return it.

When was the date of the defendant's conviction in this case? Can anybody enlighten me as to that? How much time had elapsed from the time of the seizure and the conviction? It's an '86 indictment. The case number is 102 which means it had to be in the first half of the year.

MR. DUSENBERRY: Would you like me to answer that?

THE COURT: Yes, if you can.

MR. DUSENBERRY: I was arrested on April 22, 1986.

THE COURT: That's the date of the seizure of these goods?

MR. DUSENBERRY: Yes.

THE COURT: They had a search warrant?

MR. DUSENBERRY: They got a search warrant later that day, yes.

THE COURT: All right. They arrested, then searched?

MR. DUSENBERRY: Right.

THE COURT: When were you convicted, that is, when did you plead guilty?

MR. DUSENBERRY: I entered a guilty plea in early July.

THE COURT: All right.

MR. DUSENBERRY: And I was sentenced approximately three weeks later in July.

THE COURT: All right, end of July.

Well, it's the Court's view that the property should have been returned as of the time of the conviction or forfeiture proceedings begun. There were no forfeiture proceeding begun.

The court is of the view that the value should be discounted because they were used, they weren't new at the time of the seizure, and the court is going to discount the value by 25 percent.

I'm going to ask for briefs, the government to brief the issue first as to whether the fact that the defendant concedes that some of the property is bought with drug money disqualifies him from the right to have the value of the property returned to him. I will ask that the government's brief be filed in two weeks and that a copy be provided to Mr. Dusenberry.

Mr. Dusenberry, I give you four weeks to respond to whatever argument they advance. We give it a little bit of time because I know there is always a problem in paperwork getting to the prisoners in the institutions. There is a

time lag. So four weeks from the date they file their brief on the issue of whether or not you're entitled to the discounted value of those items that you've admitted were bought by drugs.

And the Court is of the view that the gold bracelet should fit into that category. That's $1,500 and no physical signs of support. And you said you bought it at around Christmas of '85. It seems to me that leads inevitably to the conclusion it was drug money.

And so I will figure 1, 9 and 13 will be the issue of a brief as to whether or not you are entitled to the proceeds -- you're entitled to judgment for those amounts.

Are there any questions as to the order?

MR. VILLA: No, your Honor.

THE COURT: All right. I will look forward to getting your respective briefs.

Now, Mr. Dusenberry, we have this additional matter scheduled for today which is the deposition of somebody.

MR. DUSENBERRY: James Lawson.

THE COURT: Is he available? Have you got him available by phone?

MR. VILLA: He will be available by 10:30, your Honor.

THE COURT: Now, I have got this major trial go on that isn't going to start until 9:00. But I will re

so that we can conduct that at 10:30. And we will do it over here in the room off the courtroom where I handle status calls because I do have there the telephone that we can hook -- that we can do it, and have the court reporter there.

You'll have the opportunity to ask that person the questions that you wanted to by way of the deposition. The government will have the opportunity to ask your questions and hopefully we can do all that in about 15 to 20 minutes because I don't want to unduly interrupt this trial that's going on.

So I will see you all at 10:30.

And if you'd see to it that the defendant is over in that conference room at 10:30, I would appreciate it. Thank you.

(Recess taken, 8:30 a.m. to 10:50 a.m.)

THE COURT: Mr. Dusenberry, you heard the statements of the government that they wish to concede the fact that you have standing to assert title to the Chevrolet Monte Carlo, I guess it was, wasn't it?

MR. VILLA: Yes, your Honor.

THE COURT: How did you acquire that automobile?

MR. DUSENBERRY: That automobile was purchased from Michael Groff in 1985. I paid him in cash.

THE COURT: How much did you pay for it?

MR. DUSENBERRY: I paid $8,000 for the car.

THE COURT: What was the source of the cash?

MR. DUSENBERRY: I believe I paid some of the money and -- no, I believe I paid it all. And it was probably proceeds.

THE COURT: From drug proceeds?

MR. DUSENBERRY: From cocaine sales.

THE COURT: All right. Well, we will take that then, A, the government concedes standing, and B, the defendant concedes it was purchased by drug proceeds. And that will just be included in the other briefing schedule.

MR. VILLA: Thank you, your Honor.

THE COURT: Very well.

(Proceedings concluded at 10:51 a.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Caroline Mahnke 7-25-97
Caroline Mahnke, RMR Date

Caroline Mahnke, RMR

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LARRY DEAN DUSENBERRY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Case No. 5:95CV1872
86CR0102
Akron, Ohio

Telephone Deposition of
JAMES CURTIS LAWSON
Wednesday, July 23, 1997, 10:30 a.m.
Before the Honorable David D. Dowd, Judge

APPEARANCES:

For the Plaintiff: Larry Dean Dusenberry

For the Defendant:
Herbert J. Villa
James L. Morford
Assistant United States Attorneys
1880 Bank One Center
600 Superior Avenue, East
Cleveland, Ohio 44114

Court Reporter:
Caroline Mahnke
Federal Building & U.S. Courthouse
125 Market Street
Youngstown, Ohio 44503

Proceedings recorded by mechanical stenography, transcr
produced by computer-aided transcription.

Appendix 3

Caroline Mahnke, RMR

THE COURT: We are calling you today for the purpose of taking a deposition in the case of Dusenberry versus United States, 5:95CV1872.

The deposition is to be of James Lawson. Is he present?

VOICE: Yes, sir, and he is present. Let me put you on speaker phone. Do I have you, your Honor?

THE COURT: Yes.

Let me go on further with the record. Mr. Lawson?

MR. LAWSON: Yes.

THE COURT: This is Judge Dowd and I am going to preside over your deposition to be taken by Larry Dean Dusenberry, and I would ask now that you take the oath.

JAMES CURTIS LAWSON,

a witness called by the Plaintiff, being first duly sworn, was examined and testified as follows:

THE COURT: Very well. Now, present in the room is, of course, Mr. Dusenberry, a court reporter, Mr. Villa, Mr. Morford, my law clerk, several people from the marshal's office and of course Mr. Dusenberry.

Mr. Dusenberry, you made proceed now with your questions.

EXAMINATION OF JAMES CURTIS LAWSON

BY MR. DUSENBERRY:

Q. For the record, please state your full name and spell

your last name.

A. James Curtis Lawson, last name spelling L-A-W-S-O-N.

Q. And what is your occupation?

A. I am employed at FCI Milan. My position is an Inmate Systems Officer.

Q. How long have you been employed in that capacity?

A. Approximately ten years.

Q. When did you begin to work in the mail room at FCI Milan?

A. I believe that was in early '88.

Q. You do not know the date?

A. I do not know specifically when I began working in the mail room, no, sir.

Q. Did you work in the mail room in November of 1988?

A. Yes, sir, I did.

Q. Have you consulted with any government officials such as Gregory Sasse or any other United States attorney, FBI agent, etcetera pertaining to today's deposition?

A. I've consulted with our staff attorney, Mr. Walasinski.

Q. And what did you discuss?

A. We simply covered my earlier statement, reviewed it.

Q. Did any government official prepare you for today's disposition?

THE COURT: It's deposition.

BY MR. DUSENBERRY:

Q. Deposition?
A. No, sir.
Q. Were you coached by any government official as to what you are to say in today's deposition?
A. No, sir, I was not.
Q. Have you had any disciplinary reports, remands, reprimands, etcetera, since you have been employed by the Bureau of Prisons?

MR. VILLA: Your Honor, I would object to that.

THE COURT: Objection sustained.

BY MR. DUSENBERRY:

Q. Have you ever been arrested?

MR. VILLA: Your Honor, I would object to that.

THE COURT: Sustained.

You can ask if he's ever been convicted of a felony.

BY MR. DUSENBERRY:

Q. Have you ever been convicted of a felony?
A. No, sir, I have not.
Q. Do you hold any bad feelings or prejudice against me for any reasons relating to my incarceration at FCI Milan?
A. No, sir, I do not.
Q. Have you ever been involved in any investigations pertaining to me?
A. Not to my knowledge, no.
Q. Have I ever sued you?

A. Not that I know of.
Q. Do you hold any prejudice against me for suing any of your fellow employees?
A. No, sir, I do not.
Q. Do you have any other relatives working within the Bureau of Prisons?
A. No, I do not.
Q. You have sworn out an affidavit pertaining to a certified mail receipt that relates to this case, correct?
A. Yes, I have.
Q. In your affidavit, you allege that you received a copy of the certified mail receipt from the legal department, FCI Milan, and that they received the copy from the U.S. attorney's office for the Northern District of Ohio; correct?
A. Yes, sir, that is correct.
Q. Now, this certified mail was allegedly sent November 1988, correct?
A. Yes.
Q. You claim in your affidavit that you -- after you received the certified mail receipt from the legal department which was originally sent in November 1988, [illegible] years ago, that you can identify the signature on tha[illegible] receipt, correct?
A. Yes, I can identify that as being my own.

Q. And you claim the signature on the receipt is yours?
A. That is correct.
Q. You are a hundred percent sure?
A. Yes, I am.
Q. Is it true that the receipt contains an illegible signature?
A. I can identify it as my own. I can't determine whether or not someone else would classify it as being illegible.
Q. Is it a signature or is it initials?
A. It is initials, sir.
Q. If an ordinary person was to look at the signature, could they identify the signature?
A. I doubt that.
Q. Is there any way possible that the signature could be someone else's?
A. Yes, there is that possibility.
Q. Has anyone requested you to say that it's your signature?
A. No, sir.
Q. Do you admit that the certified mail receipt has an incorrect post office box number and is not the post office box number for FCI Milan?
A. Sir, on the copy that I have of that receipt, I canr determine that. It's somewhat blurred.
Q. What is the post office box that was on the cert

mail receipt? What is the post office box for Milan, Michigan?
A. We have two post office boxes that we use for the institution. One is 9999, the other one is 1000.
Q. Are you aware that the certified mail receipt had P.O. Box 100 on it?
A. Sir, I'm looking at a photocopy and I really can't determine that.
Q. Is it a letter, the photocopy, is it on the front of a letter?
A. One moment. Yes, it is.
Q. What does it say at the top?
A. P.O. Box 100.
Q. Thank you.
So, you say that the signature could possibly be somebody else's; is that correct?
A. I guess there is that possibility, but looking at it, I can identify that as either being my signature or one very similar to it.
Q. Do you admit that all certified mail that arrives at FCI Milan must be signed in a log book and acknowledge receipt of the certified piece of mail?
A. That is correct.
Q. Can you produce this log book?
A. No, sir, I cannot.

Q. If you cannot produce the log book, do you admit that you cannot prove that whatever was attached to the certified mail receipt was ultimately forwarded to Larry Dusenberry through the prison mail system?

A. No, sir, I cannot prove that.

Q. In other words, after you signed for the mail and brought it to the mail room at FCI Milan, if it is your signature, you do not know what happened to the mail after that, correct?

A. Due to the fact that there is no longer a log book because we dispose of those one year after closing, there is no longer a paper trail that would allow us to trace that back, sir.

Q. My question to you is: Do you know what happened to the mail after it came to FCI Milan?

A. Procedure would be that I would log it in, sir, identifying your name, the registered number, or I should say the certification number, and it would be signed for by your unit team and then given to yourself.

Q. But because you do not have the log book, you do not know what happened to the mail; is that correct?

A. That is a correct statement, sir.

Q. Do the counselors in each inmate's housing unit al have a log book in which they have the inmate sign fo certified mail before the mail is given to the inma

separate log book than the log book in the mail room?

A. Sir, I do not know if that is policy because it is not something that would be pertinent to my department. That would be case workers' responsibility.

Q. Can you find that out for me?

A. Sure, I would be happy to look into that.

Q. The Bureau of Prisons does not keep these log books in an archive for later purposes such as this one?

A. No, they don't. Those are held for one year after they're closed and then they are disposed of. That is per BOP policy.

MR. DUSENBERRY: That's all I have.

THE COURT: Anything further?

EXAMINATION OF JAMES CURTIS LAWSON

BY MR. VILLA:

Q. Mr. Lawson, this is Herbert Villa, of the U.S. attorney's office.

A. Yes.

Q. I would like to get back to the issue that it's possible that the signature could be somebody else's.

If you look at that signature, of course somebody could duplicate it, perhaps, but to the best of your knowledge, t the best of your vision, is that your signature on that card?

A. Yes, sir, it is.

MR. VILLA: I don't have any further questions.

THE COURT: Anything further?

EXAMINATION OF JAMES CURTIS LAWSON

BY MR. DUSENBERRY:

Q. But you do admit that it's possible that signature could be someone else's?

A. I think that would be speculation. Anything is possible, but I can't identify that as being my signature.

Q. But you are not a hundred percent sure?

A. Well, I can state that that is identical to my signature, sir.

Q. But you're not sure -- you are not a hundred percent sure if it is your signature?

A. I can honestly say that is my signature, but like I said before, you know, if you want to take it into the realm of what could be, yes, it could be a forgery.

Q. It could be somebody else's signature?

A. That is possible.

MR. VILLA: Thank you.

THE COURT: I believe that concludes the deposition. Thank you very much.

Kindly, I will direct the court reporter to transcribe the deposition and then the clerks office to mail a copy to Mr. Dusenberry, and I will accept further briefing on the convening motions for summary judgment.

I would ask that each of you file your supplemental brief no later than four weeks from now which we'll set the date as -- well, let's make it August 22. Maybe it will be a little more than four weeks. And then I will consider the matter submitted. Thank you very much for everybody's cooperation, especially in Milan. Thanks.

MR. LAWSON: Thank you, your Honor.

THE COURT: This deposition here is over.

MR. LAWSON: Thank you very much. Good-bye.

THE COURT: Good-bye.

MR. VILLA: Your Honor, off the record for a minute.

(Deposition concluded 10:50 a.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Caroline Mahnke 7-25-97

Caroline Mahnke, RMR Date

FILED
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CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
AKRON

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA.	)	CASE NO. 5:95-CV-1872 5:86-CR-102
Plaintiff.	)	
v.	)	Judge James S. Gwin
LARRY DEAN DUSENBERY.	)	
Defendant.	)	OPINION AND ORDER

On March 26, 1997, Defendant Larry Dean Dusenbery filed a motion for summary judgment in this forfeiture case. [Doc. 138]. On March 28, 1997, Plaintiff United States filed a motion for summary judgment. [Doc. 139]. Both parties supplemented their motions with later briefs. [Docs. 152, 154, 173, 174, and 175].

In this opinion, the Court must determine whether a genuine issue of material fact exists regarding whether the government provided proper notice to Defendant Dusenbery when forfeiting cash proceeds from drug sales. The Court finds that Plaintiff United States provided proper notice.

APPENDIX 4

The Court must also determine whether Plaintiff Dusenbery has a right to compensation for personal property that was destroyed upon his conviction or for which he had improper notice of forfeiture. The Court finds that Defendant Dusenbery is not entitled to compensation for the personal property.

Accordingly, the Court grants Plaintiff United States' motion for summary judgment and denies Defendant Dusenbery's motion for summary judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

On April 29, 1986, Defendant Dusenbery was arrested on drug and possession of firearm charges. During a search of Dusenbery's property at the time of the arrest, law enforcement agents seized approximately $21,940 in cash, a 1984 Chevrolet Monte Carlo automobile, and miscellaneous personal property.

After Defendant Dusenbery's conviction.[1] the government, with the assent of the U.S. Attorney's Office, abandoned or destroyed Dusenbery's personal property as evidence. No official forfeiture proceeding was initiated. Dusenbery's right to compensation for this property is at issue.

The government initiated administrative forfeiture proceedings pursuant to 21 U.S.C. § 881(a)(6) with regard to the cash and the automobile as proceeds of drug sales. Defendant Dusenbery did not file a bond to stop the administrative proceedings as required by C.F.R. § 1316.76 and the forfeiture proceeded. Dusenbery claims he did not do so because he never received notice of the forfeiture proceedings.

[1] Dusenbery pled guilty to the drug charge and was sentenced on July 15, 1986.

In 1993, Plaintiff Dusenbery filed a Rule 41(e) motion requesting the return of the seized property. United States District Judge David D. Dowd denied Dusenbery's motion for lack of jurisdiction.[2] On September 25, 1996, the United States Court of Appeals for the Sixth Circuit vacated the judgment and remanded the case.[3] The Sixth Circuit directed that the district court "construe the matter as a civil action seeking equitable relief and determine whether the government provided Dusenbery with actual notice of the various forfeitures."[4]

Subsequent to the Sixth Circuit opinion, both parties in this case filed motions for summary judgment.

On May 29, 1997, District Court Judge Dowd ordered an evidentiary hearing to determine the value of the personal property and the validity of a prison employee's declaration that notice of the cash's forfeiture was received at the prison where Defendant Dusenbery was incarcerated. At the hearing, the Court presided over a telephone deposition of James Lawson, an Inmate Systems Officer and the Federal Correctional Institution in Milan, Michigan, where Defendant Dusenbery was incarcerated at the time the alleged notice regarding the cash was delivered.

At the hearing, District Court Judge Dowd determined that the personal property should have been returned upon Dusenbery's conviction. Because no forfeiture proceeding was initiated regarding the personal property and the property

[2] A complete history of the procedure of this case is set forth in District Judge Dowd's opinion of October 5, 1995 [Doc. 115].

[3] Doc. 121.

[4] *Id.*

had been destroyed, Judge Dowd found that Defendant Dusenbery was entitled to the value of the personal property at the time it was seized and not returned. Judge Dowd reduced the value of the property by twenty-five percent because the property was not new at the time of the seizure.

Also at the hearing, Defendant Dusenbery admitted he purchased items of personal property and the 1984 Monte Carlo with proceeds from drugs sales. District Court Judge Dowd directed the parties to brief the issue whether Defendant Dusenbery was entitled to the value of personal property and the vehicle bought with drug money.

On September 15, 1997, before rendering a decision on the issues in this case, District Court Judge Dowd granted Defendant Dusenbery's request for recusal.[5] The case was ultimately reassigned to District Court Judge James S. Gwin, who determines the pending issues herein.

II. STANDARD OF REVIEW

Fed. R. Civ. P. 56 (c) states the procedure for granting summary judgment and says in pertinent part:

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In considering a motion for summary judgment, the court must view the fact and all inferences to be drawn therefrom in the light most favorable to the non-mo

[5] Doc. 160.

party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970); *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987); *SEC v. Blavin*, 760 F.2d 706, 710 (6th Cir. 1985). The moving party has the burden of showing conclusively that no genuine issue of material fact exists. *60 Ivy Street Corp.*, 822 F.2d at 1435.

Essentially factual disputes about matters essential to adjudication preclude the Court from granting summary judgment. *See id.* But not every factual dispute between the parties will prevent summary judgment. Rather, the disputed facts must be material. They must be facts which, under the substantive law governing the issue, might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The factual dispute must also be genuine. The facts must be such that if they were proven at trial a reasonable jury could return a verdict for the non-moving party. *Id.* at 248. The disputed issue does not have to be resolved conclusively in favor of the non-moving party, but that party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. *60 Ivy Street*, 822 F.2d at 1435 (citing *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968)); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Thus, the judge's function at the point of summary judgment is limited to determining whether sufficient evidence has been presented to make the issue a proper jury question, and not to judge the evidence and make findings of fact. "[A]t the

summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *60 Ivy Street*, 822 F.2d at 1436 (quoting *Anderson*, 477 U.S. at 249).

Both Plaintiff United States and Defendant Dusenbery move for summary judgment. The Court addresses the relevant issues in turn.

III. ANALYSIS

A. $21,939 in Cash

Defendant Dusenbery claims he never received proper notice that forfeiture proceedings regarding the seized cash had been instituted. The Court disagrees and grants Plaintiff United States' motion for summary judgment and denies Defendant Dusenbery's motion on this issue.

The government admits that the address on the notice was incorrect; instead of reading P.O. Box 1000, the notice was addressed to P.O. Box 100 in Milan, Michigan. The certified mail receipt contained an arguably illegible signature. In its opinion directing District Court Judge Dowd to evaluate the notice in this case, the Sixth Circuit pointed out that the government had not, as of that date, produced sufficient evidence that a prison employee signed for the forfeiture notice or the standard procedure for processing such notice once it arrived at the prison.

Since the Sixth Circuit's opinion, the government has offered the affidavit of James Lawson, an Inmate Systems Officer at the Milan Facility. Mr. Lawson attests that he signed the certified mail receipt and described the process for forwarding

mail to the inmates.[6] Mr. Lawson's deposition testimony is consistent with his affidavit.

Defendant Dusenbery counters Mr. Lawson's testimony one two grounds. First, Dusenbery argues that even if the Court accepts that notice arrived at the Milan facility, the government cannot show that notice was forwarded to him. Second, Dusenbery points out that Mr. Lawson admitted he could not be "100%" certain that the signature on the receipt was his; that is, there is a "possibility" that the signature was forged or was signed by the owner of P.O. Box 100 instead of P.O. Box 1000. The Court is not persuaded by Defendant Dusenbery's arguments.

First, the Sixth Circuit does not require the government to show the mail actually reached an inmate in order to satisfy requirements of due process. In *United States v. Real Property, Tree Top, et al.*, 129 F.3d 1266 (TABLE), 1997 WL 702771 (6th Cir. 1997), the Sixth Circuit addressed a contention of inadequate notice posed by an inmate at the Milan facility. The Sixth Circuit found that proof of certified mail sent to an inmate's place of residence satisfied the inmate's due process rights. *Id.* at *2.

The government in this case has provided persuasive evidence that a prison mail room employee, Mr. Lawson, signed the certified mail receipt. This notice was reasonably calculated to notify Defendant Dusenbery of the forfeiture action. Under *Tree Top*, it is not the government's burden to show, as Defendant Dusenbery argues,

[6] Mr. Lawson states that as a Mail Room employee at the Milan facility, he reviewed and signed the certified mail receipt. All certified mail is entered into a log book before the mail leaves the Mail Room. A staff member assigned to the inmate signs for the inmate's mail and delivers it to the inmate. Mr. Lawson states that the log book no longer exists. According to prison policy, the log books are disposed of after one year.

that he actually received the notice.[7]

Dusenbery's assertion that there is a possibility of forgery is similarly unconvincing. Even viewing Dusenbery's argument in a light most favorable to him, the Court cannot recognize a mere possibility of forgery as sufficient evidence to survive a summary judgment motion.

Accordingly, the Court grants the government's motion and denies Defendant Dusenbery's motion with regard to the $21,940 in cash.

B. 1984 Monte Carlo and Miscellaneous Personal Property

Defendant Dusenbery argues that the government's notice of forfeiture regarding the Monte Carlo was insufficient to notify him of the proceeding. Dusenbery

[7] Defendant Dusenbery argues this Court cannot rely on *Tree Top*, an unpublished opinion, for its decision here. Dusenbery is correct that Sixth Circuit Rule 24(c) states citation of unpublished opinions is disfavored except for establishing res judicata, estoppel, or the law of the case.

However, the rule also states:

> If counsel believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such decision may be cited if counsel serves a copy thereof on all other parties in the case and on the court. Such service may be accomplished by including a copy of the decision in an addendum to the brief.

The government included a copy of *Tree Top* in its supplemental pleading, Doc. 174. It is undisputed that Defendant Dusenbery received a copy of the opinion, as he references it in his supplemental pleading, Doc. 175.

The sufficiency of notice is a material issue in this case and no other published opinion of the Sixth Circuit falls as squarely on the facts of this case as *Tree Top*. The *Tree Top* opinion is also significant because it was decided after the Sixth Circuit's opinion remanding this case to the district court for determination as to the sufficiency of notice and is the most recent reflection of Sixth Circuit law on point. Therefore, Defendant Dusenbery's argument that this Court should not rely on *Tree Top* is of no moment.

also claims violation of his due process rights when the government destroyed miscellaneous items of personal property after his conviction. Dusenbery makes no allegations of illegal seizure of the car or items of personal property. The government concedes Dusenbery has standing to bring claims about the car despite the fact that Dusenbery's stepmother is the titled owner.[1]

At the hearing to determine the value of the personal property, Defendant Dusenbery admitted that the car and personal property were purchased with drug proceeds. District Court Judge Dowd directed the parties to brief the Court about whether Dusenbery's admission disqualifies him from having his vehicle returned to him for lack of proper notice or from being compensated for the personal property's destruction without a forfeiture proceeding.

In other words, this Court is not presented with the issue of sufficiency of notice regarding forfeiture of the Monte Carlo or violation of Dusenbery's due process rights upon the destruction of his personal property.[2] Instead, this Court must determine whether Defendant Dusenbery is entitled to compensation. The Court finds he is not.

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[1] Doc. 149.

[2] The Court notes that there appears to be no issue of notice to resolve. In its opinion confirming the district court's jurisdiction over the case, the Sixth Circuit directed the Court to determine the propriety of the government's notice regarding forfeiture of the $21,939 in cash and the Monte Carlo. This Court has already determined that notice regarding the cash was sufficient. *See* Part III.A, *supra*.

With regard to forfeiture of the Monte Carlo, the Sixth Circuit noted the attenuated nature of the evidence of notice. *See* Doc. 121, at 4. Since the Sixth Circuit's opinion, this Court can find no record of the government's offering evidence to support the legitimacy of notice of forfeiture of the Monte Carlo. Further, the evidentiary hearing transcript indicates Dusenbery was entitled to compensation, prior to his admission that the car and personal property were purchased with drug proceeds. Therefore, this Court addresses only the effect of Dusenbery's admission on his right to compensation.

The Court notes first that although Judge Dowd identified three items of personal property as being purchased with drug proceeds, Defendant Dusenbery's testimony at the hearing indicates that all items of personal property were purchased with drug proceeds:

> Q: Was any of this [personal] property purchased on credit cards?
>
> A: No, sir.
>
> Q: Was it purchased by cash?
>
> A: Yes.
>
> Q: And where did the cash come from?
>
> A: It came from me.
>
> Q: Were you employed?
>
> A: No.
>
> Q: Where did the cash come from then?
>
> A: From selling drugs.
>
> * * * *
>
> The Court: You indicated . . . that the source of the money for at least one of the purchases is drug money. Is it your position that all these items were bought with drug money?
>
> Mr. Dusenbery: Yes, your honor.

Evidentiary Hearing Transcript, Doc. 147, at 11-12, 15.

With regard to the Monte Carlo, the Court found it was purchased with drug

proceeds:

> The Court: How did you acquire that automobile?
>
> Mr. Dusenbery: That automobile was purchased from Michael Groff in 1985. I paid him in cash.
>
> The Court: How much did you pay for it?
>
> Mr. Dusenbery: I paid $8,000 for the car.
>
> The Court: What was the source of the cash?
>
> Mr. Dusenbery: I believe I paid some of the money and — no I believe I paid it all. And it was probably proceeds.
>
> The Court: From drug proceeds?
>
> Mr. Dusenbery: From cocaine sales.
>
> The Court: All right. Well, we'll take that . . . the defendant concedes it was purchased by drug proceeds.

Evidentiary Hearing Transcript, Doc. 147, at 22.

Defendant Dusenbery's admission about drug proceeds, combined with his testimony that he had been unemployed since 1983 — two years before any of the items or the car at issue was purchased — lead this Court to find that all items of personal property and the car were purchased with drug proceeds. Therefore, the Court's disposition on the issue of compensation applies equally to all the personal property and the Monte Carlo.

Defendant Dusenbery argues he is entitled to compensation for the violation of his rights. The Court is not persuaded.

Acquisition of property through drug proceeds affects a claimant's right to that property in forfeiture actions. In the Sixth Circuit, "one never acquires a property right to [drug] proceeds, which include not only cash but also property secured with the proceeds of illegal activity." *United States v. Salinas*, 65 F.3d 551, 553 (6th Cir. 1995). As another court explained, someone who purchases property with drug proceeds "has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity." *United States v. Tilley*, 18 F.3d 295, 300 (5th Cir. 1994). The Sixth Circuit specifically pointed to *Tilley* for support in the *Salinas* opinion.

Although proper notice was not at issue in either *Salinas* or *Tilley*, the general principle in those cases remains. Defendant Dusenbery has no property rights in the Monte Carlo or the personal property. To order compensation for destruction of this property or improper notice of forfeiture would allow Dusenbery to retain the fruits of illegal activities, his involvement in which is undisputed.

In short, Defendant Dusenbery concedes he purchased the property with drug proceeds. He does not challenge the legality of the seizure of this property. In light of these concessions, this Court can find no genuine issue of material fact which survives for trial.

Further, in light of the illegal source of the Monte Carlo and personal property, it would be against public policy to allow Dusenbery to retain property which he obtained as a result of illegal activity.

Accordingly, the Court declines to exercise its equitable powers to compensate

Case No. 5:95-CV-1872 (5:86-CR-102)
Gwin, J.

Defendant Dusenbery regarding the Monte Carlo and the personal property.

IV. CONCLUSION

For the reasons described herein, the Court grants Plaintiff United States' motion for summary judgment and denies Defendant Dusenbery's motion for summary judgment.

IT IS SO ORDERED.

Date: January 15, 1999

Hon. James S. Gwin
U.S. District Judge

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CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
AKRON

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA.	CASE NO. 5:95-CV-1872 5:86-CR-102
Plaintiff.	
v.	Judge James S. Gwin
LARRY DEAN DUSENBERY.	ORDER
Defendant.	

The Court has entered its memorandum opinion in the above-captioned case. For the reasons stated therein, the Court grants Plaintiff United States' motion for summary judgment and denies Defendant Dusenbery's motion for summary judgment.

Accordingly, this action is terminated pursuant to Fed. R. Civ. P. 58.

IT IS SO ORDERED.

Date: January 15, 1999

Hon. James S. Gwin
U.S. District Judge

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2000 FED App. 0269P (6th Cir.)
File Name: 00a0269p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LARRY DEAN DUSENBERY,
Defendant-Appellant.

No. 99-3148

Appeal from the United States District Court
for the Northern District of Ohio at Akron.
No. 95-01872—James S. Gwin, District Judge.

Submitted: June 15, 2000

Decided and Filed: July 10, 2000*

Before: MARTIN, Chief Judge; WELLFORD and BATCHELDER, Circuit Judges.

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*This decision was originally issued as an "unpublished decision" filed on July 10, 2000. On August 1, 2000, the court designated the opinion as one recommended for full-text publication.

Appendix 5

COUNSEL

ON BRIEF: Larry Dean Dusenbery, Terre Haute, Indiana, pro se. Herbert J. Villa, ASSISTANT U.S. ATTORNEY, Cleveland, Ohio, for Appellee.

OPINION

PER CURIAM. Larry Dean Dusenbery appeals a district court judgment granting summary judgment for the government in this administrative forfeiture proceeding initiated pursuant to 21 U.S.C. § 881(a)(6). This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

On April 29, 1986, Dusenbery was arrested on drug and possession of firearm charges. During a search of Dusenbery's property at the time of the arrest, law enforcement agents seized approximately $21,940 in cash, a 1984 Chevrolet Monte Carlo automobile, and miscellaneous personal property. Dusenbery's claim for compensation for this property is now at issue.

Dusenbery initially filed a Fed. R. Crim. P. 41(e) motion requesting the return of the seized property, which motion was denied. Upon appeal, this court vacated the district court's judgment and remanded the case. *See Dusenbery v. United States*, No. 95-4188, 1996 WL 549818 (6th Cir. Sept. 25, 1996) (unpublished order). We directed that the district court "construe the matter as a civil action seeking equitable relief and determine whether the government provided Dusenbery with actual notice of the various forfeitures." *Id.* at *3.

The district court then presided over a telephone deposition of James Lawson, an Inmate Systems Officers at the Federal Correctional Institution in Milan, Michigan, where Dusenbery was incarcerated at the time the alleged notice regarding the cash was delivered in connection with this controversy.

The district court determined that the personal property should have been returned upon Dusenbery's conviction, but some personal items had been destroyed and no forfeiture proceeding had been initiated. In addition, the district court found that Dusenbery was entitled to the value of the personal property at the time it was seized. More significant, however, at that hearing *Dusenbery admitted that he purchased the items of personal property and the 1984 Monte Carlo with proceeds from drug sales*. The district court then directed the parties to brief the issue whether Dusenbery was entitled to the value of personal property and the vehicle admittedly bought with drug money.

After the case was reassigned to another district judge, the court determined that the notice received at the Milan prison facility was reasonably calculated to notify Dusenbery of the forfeiture action, and that since Dusenbery admitted that he purchased the 1984 Monte Carlo and miscellaneous personal property with drug proceeds, he had *no property rights* in these items. Summary judgment was accordingly granted to the government, and this timely appeal followed.

This court reviews a judgment granting summary judgment de novo and uses the same standards as used by the district court. *See EEOC v. Prevo's Family Mkt., Inc.*, 135 F.3d 1089, 1093 (6th Cir. 1998); *Peoples Bank & Trust Co. of Madison County v. Aetna Cas. & Sur. Co.*, 113 F.3d 629, 633 (6th Cir. 1997). Summary judgment is appropriate where "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." *See* Fed. R. Civ. P. 56(c); *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993). The party opposing a motion for summary judgment "'may not rest upon the mere allegations or denial of his pleading, but . . .

must set forth specific facts showing that there is a genuine issue for trial.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (quoting former Fed. R. Civ. P. 56(e)). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

We conclude first that summary judgment for the government was proper regarding the $21,929 in cash. The government has provided persuasive evidence that a prison mail room employee signed the certified mail receipt. The government has offered the affidavit of James Lawson, an Inmate Systems Officer at the Milan Facility. Lawson attested that he signed the certified mail receipt and described the process for forwarding prison mail to the inmates. Lawson's deposition testimony is consistent with his affidavit.

Notwithstanding Dusenbery's contention that he did not receive actual notice, this notice was "reasonably calculated, under all the circumstances, to apprise [him] of the pendency of the action and afford [him] an opportunity to present [his] objections." *Mullane*, 339 U.S. at 314. As the district court correctly stated, citing *United States v. Real Property, Tree Top*, No. 96-3757, 1997 WL 702771, at *2 (6th Cir. Oct. 31, 1997) (unpublished opinion), this court does not require the government to show that the mail actually reached an inmate in order to satisfy requirements of due process. Because adequate notice was given, Dusenbery is not entitled to relief on this claim. The *Tree Top* decision was decided after this court's opinion remanding this case to the district court for determination as to the sufficiency of notice and is the most recent reflection of Sixth Circuit law on point.

At the hearing to determine the value of the personal property, Dusenbery admitted that the car and personal property were purchased with drug proceeds. Thus, the sufficiency of notice regarding forfeiture of the Monte Carlo or violation of Dusenbery's due process rights upon the

destruction of his personal property are not the issues presented in this case. Instead, the issue is simply whether Dusenbery is entitled to compensation under that admitted circumstance.

Acquisition of property through drug proceeds affects a claimant's right to that property in forfeiture actions. In this circuit, "one never acquires a property right to [drug] proceeds, which include not only cash but also property secured with the proceeds of illegal activity." *United States v. Salinas*, 65 F.3d 551, 553 (6th Cir. 1995). *See also United States v. Tilley*, 18 F.3d 295, 300 (5th Cir. 1994) (Someone who purchases property with drug proceeds "has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity.").

Dusenbery's admission about drug proceeds, combined with his testimony that he had been unemployed since 1983--two years before any of the items or the car at issue was purchased--leads to the conclusion that the personal property and the car involved were purchased with drug proceeds. Dusenbery had no property rights, therefore, in the Monte Carlo or the personal property. To order compensation for destruction of this property or improper notice of forfeiture would allow Dusenbery to retain the fruits of illegal activities, his involvement in which is undisputed. Further, as pointed out by the district court, in light of the illegal source of the Monte Carlo and personal property, it would be against public policy to allow Dusenbery to retain property which he obtained as a result of illegal activity. Accordingly, summary judgment for the government was proper regarding all personal property, including cash and the automobile.

Accordingly, the district court's judgment is **AFFIRMED**.

99-3148

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

AUG 25 2000

LEONARD GREEN, Clerk

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	ORDER
	)	
LARRY DEAN DUSENBERY,	)	
	)	
Defendant-Appellant.	)	
	)	

BEFORE: MARTIN, Chief Judge; WELLFORD and BATCHELDER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green

Leonard Green, Clerk

APPENDIX 6

RESPONSE REQUESTED
GRANTED
ORIGINAL
Supreme Court, U.S.
FILED
JAN 17 2001
CLERK

No. 00-6567

IN THE SUPREME COURT OF THE UNITED STATES

LARRY DEAN DUSENBERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

WILLIAM C. BROWN
Attorney

Department of Justice
Washington, D.C. 20530-0001
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QUESTIONS PRESENTED

1. Whether, with respect to an administrative forfeiture completed before the effective date of the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (April 25, 2000), the court of appeals erred in holding that the government provided sufficient notice to petitioner.

2. Whether the district court erred in declining to exercise equitable powers to compensate petitioner for the 1986 seizure by the government of an automobile and other items of personal property, where the evidence established that all of that property was acquired by petitioner with proceeds from unlawful drug sales.

IN THE SUPREME COURT OF THE UNITED STATES

No. 00-6567

LARRY DEAN DUSENBERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5) is reported at 223 F.3d 422. The order of the district court (Pet. App. 4) is reported at 34 F. Supp. 2d 602. A prior opinion of the court of appeals (Pet. App. 1) is not reported, but the judgment is noted at 97 F.3d 1451 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2000. Pet. App. 5. A petition for rehearing was denied on

August 25, 2000. Pet. App. 6. The petition for a writ of certiorari was filed on October 16, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After petitioner's conviction on drug charges, the government obtained administrative forfeiture of cash and an automobile, and disposed of other personal property seized from petitioner at the time of his arrest. The district court denied petitioner's subsequent motion for return of the seized property (Pet. App. 4), and the court of appeals affirmed (Pet. App. 5).

1. On April 29, 1986, petitioner was arrested on drug and firearm charges. Pet. App. 4, at 2. He pleaded guilty to a drug charge and was sentenced on July 26, 1986. Ibid. During a search of petitioner's property at the time of his arrest, law enforcement agents seized approximately $21,940 in cash, a 1984 Chevrolet Monte Carlo automobile, and miscellaneous personal property. Ibid. The cash and the automobile were administratively forfeited as the proceeds of drug sales, pursuant to 21 U.S.C. 881(a)(6), when petitioner did not file a bond as required by the forfeiture regulations applicable at that time. Ibid. The other seized personal property was abandoned or destroyed as evidence following petitioner's conviction. Ibid.

2. In 1993, seven years after the seizure, petitioner filed a motion requesting return of the seized property pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, alleging that the government had forfeited the property without giving him adequate notice of the forfeiture.[1] Pet. App. 1, at 1-2; Pet. App. 4, at 3. The district court denied that motion for lack of jurisdiction, but the court of appeals vacated that order and remanded for further proceedings. Pet. App. 1, at 1. The court of appeals explained that, although petitioner could not pursue his claim under Rule 41(e) because the criminal proceedings had been completed, the district court should have permitted petitioner's action to continue by construing petitioner's Rule 41(e) motion "as a civil complaint seeking equitable relief." Id. at 2.

3. On remand, the district court heard evidence and granted the government's motion for summary judgment. Pet. App. 4. With respect to the cash, the district court found that the government provided sufficient notice of the forfeiture proceeding when it sent notice, by certified mail, of the

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[1] Rule 41(e) provides in part: "A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court * * * for the return of the property on the ground that such person is entitled to lawful possession of the property."

proceeding to petitioner at the Federal Correctional Institution in Milan, Michigan (the "Milan FCI"), where petitioner was incarcerated at the time. Pet. App. 4, at 6-8. In reaching its conclusion that notice was sufficient, the district court relied, in part, on an affidavit from James Lawson, an Inmate Systems Officer at the Milan FCI. Lawson attested that he signed the certified mail receipt for the forfeiture notice, and he described the process in effect at that time for forwarding certified mail to inmates.[2] Id. at 6, 7 & n.6. With respect to the automobile and the other personal property seized from petitioner at the time of his arrest, the district court found that the evidence in the present case, including petitioner's admissions, demonstrated that all of those items were purchased with proceeds from unlawful drug sales. The court therefore declined to exercise its equitable powers to compensate petitioner. Id. at 8-13.

4. The court of appeals affirmed. Pet. App. 5. The court of appeals agreed with the district court that the

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[2] Under the system in place at the time the notice was received at the Milan FCI in 1986, all certified mail was entered into a log book before the mail left the mail room, and a staff member assigned to the inmate signed for the inmate's mail and delivered it to the inmate. Pet. App. 4, at 7 n.6. At the time of Lawson's testimony in 1997, the 1986 log book no longer existed. Ibid.

administrative forfeiture of the approximately $21,940 in cash was proper. Pet. App. 5, at 4. The court observed that the government had provided "persuasive evidence" that the forfeiture notice was delivered by certified mail to the facility where petitioner was incarcerated, and it noted the evidence of the process for forwarding that mail to the inmates. Ibid. The court of appeals thus concluded that the forfeiture notice to petitioner was sufficient and "reasonably calculated, under all the circumstances, to apprise [petitioner] of the pendency of the action and afford [him] an opportunity to present [his] objections." Ibid. (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)). The court further ruled that due process did not require the government to prove that the mail actually reached petitioner. Pet. App. 5, at 4.

The court of appeals also upheld the district court's order declining to grant petitioner compensation for the seized automobile and the other personal property that petitioner had acquired with drug proceeds. Pet. App. 5, at 5. The court of appeals held that "one never acquires a property right to [drug] proceeds," and it therefore declined to allow petitioner "to

retain the fruits of illegal activities, his involvement in which is undisputed."[3] Ibid.

ARGUMENT

1. Petitioner contends (Pet. 12-18) that he was not provided with adequate notice before the administrative forfeiture of the $21,940 in currency seized at the time of his 1986 arrest. As petitioner explains (Pet. 16-17), the courts of appeals are divided on whether the government must show that an incarcerated claimant received actual notice of a forfeiture proceeding. The court below correctly decided that the forfeiture notice sent by certified mail to petitioner at the facility where he was incarcerated was sufficient to comply with the requirements of due process. Further review is not warranted, particularly in light of the recent enactment of the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185,

[3] During the time that petitioner was imprisoned following his 1986 conviction, he continued to manage his cocaine distribution network. That conduct resulted in a separate conviction in 1994 for engaging in a Continuing Criminal Enterprise, in violation of 21 U.S.C. 848, and in the forfeiture of additional property. See United States v. Dusenbery, 1996 WL 306517 (6th Cir.) (affirming CCE conviction), cert. denied, 519 U.S. 956 (1996). The Sixth Circuit subsequently rejected petitioner's challenge to the validity of the forfeitures associated with that 1994 conviction, and this Court recently denied review. United States v. Dusenbery, 201 F.3d 763 (6th Cir. 2000), cert. denied, 121 S. Ct. 301 (No. 99-9814, October 10, 2000).

114 Stat. 202 (April 25, 2000) (codified at 18 U.S.C. 983), which establishes a comprehensive structure governing motions to set aside civil forfeitures based on lack of notice.

The means used to notify petitioner of the currency forfeiture proceeding satisfied constitutional requirements. This Court has recognized that due process requires that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 314. In this case, notice of the currency forfeiture was sent by certified mail to the penal institution where petitioner was incarcerated, and there was additional evidence that a system was in place within that institution to assure delivery of certified mail to the inmates. Pet. App. 4, at 6-8, 7 n.6. As the court of appeals explained, this notice was "reasonably calculated" to apprise petitioner of the forfeiture action and thus was constitutionally sufficient. Pet. App. 5, at 4 (quoting Mullane, 339 U.S. at 314); see also Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983) (notice by mail is typically sufficient for due process purposes).[4]

[4] Petitioner renews his argument that the notice was misaddressed and may not in fact have been received at the Milan

"'Reasonably calculated' means likelihood, not certainty," and proof of actual receipt of notice by an incarcerated forfeiture claimant is not required. Whiting v. United States, 231 F.3d 70, 76 (1st Cir. 2000) (certified mail notice sent to prisoner at the proper address affords due process in a civil forfeiture case); see United States v. Minor, 228 F.3d 352, 357-358 (4th Cir. 2000) (actual notice not required, suggesting that certified mail plus evidence of delivery procedures within the prison would be sufficient); United States v. One Toshiba Color Television, 213 F.3d 147 (3d Cir. 2000) (en banc) (actual notice not required); United States v. Real Property, 135 F.3d 1312, 1315-1316 (9th Cir. 1998) (rejecting inmate claimant's argument that due process requires that he receive actual notice of the forfeiture proceedings); United States v. Clark, 84 F.3d 378, 381 (10th Cir. 1996) (concluding that the government complied with due process requirements when it sent notice by certified

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FCI. Pet. 15 (pointing out that the notice was addressed to P.O. Box 100 rather than P.O. Box 1000 in Milan). The evidence, however, showed that the address was sufficient in that the notice was in fact received at the Milan FCI where it was signed for by the appropriate prison official. Pet. App. 4, at 6-7. In any event, the factual determination by both courts below that the notice was properly directed to the prison where petitioner was incarcerated at the time does not warrant further review. See Pet. App. 4, at 6-8; id. at 9 n.9; Pet. App. 5, at 4 (noting "persuasive evidence that a prison mail room employee signed the certified mail receipt").

mail to prison where claimant was incarcerated, even if claimant may not actually have received notice).

Petitioner argues that these decisions and the decision of the court below are inconsistent with decisions in other circuits that require the government to establish actual delivery of the forfeiture notice to an incarcerated claimant. Pet. 14-18. In Weng v. United States, 137 F.3d 709 (2d Cir. 1998), the Second Circuit did hold that mailing of a forfeiture notice to an inmate's place of incarceration was not necessarily sufficient, and that "actual delivery" to the intended recipient must be shown. Id. at 715. The Eighth Circuit has adopted a similar rule.[5] United States v. Five Thousand Dollars in U.S. Currency, 184 F.3d 958 (8th Cir. 1999); United States v. Woodall, 12 F.3d 791 (8th Cir. 1993).

The Weng requirement of proof of actual notice "undermines the procedural analysis that has heretofore animated the Supreme

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[5] Contrary to petitioner's assertion, the First Circuit does not require actual notice. In United States v. Giraldo, 45 F.3d 509 (1st Cir. 1995), the notice at issue was apparently sent to an inmate's home address, not to his prison address, during the time he was incarcerated. The Giraldo court did not resolve whether the notice provided in that case was sufficient. Id. at 510-512 (remanding for consideration whether notice provided was adequate). In its more recent decision in Whiting, the First Circuit concluded that, absent special circumstances, mailing of a forfeiture notice to the prison where a claimant is being held is sufficient to comply with the requirements of due process. Whiting v. United States, 231 F.3d at 76-77.

Court's dictates" on notice requirements. One Toshiba Color Television, 213 F.3d at 155. This Court has "never employed an actual notice standard in its jurisprudence. Rather, its focus has always been on the procedures in place to effect notice." Ibid. (citing Mennonite Bd. of Missions, 462 U.S. at 799-800). Further, an actual notice requirement "could impose an undue evidentiary burden on the government, particularly in cases - such as the present case - in which the prisoner challenged the sufficiency of notice long after the completion of the forfeiture." United States v. Minor, 228 F.3d at 358. "In such cases, 'an overly strict notice requirement could lead to unsettling the outcome of completed proceedings based on nothing but bare allegations of a party who has lost his property.'" Ibid. (quoting One Toshiba Television, 213 F.3d at 155). That concern is present in this case, because petitioner did not challenge the forfeiture until seven years after the 1986 seizure of the currency, when prison logs that would have provided information regarding the delivery of the certified mail notice had been destroyed. See Pet. App. 4, at 7 n.9.

In any event, notwithstanding the differing views among the circuits on the need for proof of actual delivery, further review is not warranted in light of the enactment of the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114

Stat. 202 (April 25, 2000), codified at 18 U.S.C. 983 (Westlaw 2001), which markedly changes the context in which this type of litigation will be conducted. The new Act is applicable to forfeiture proceedings commenced on or after August 23, 2000. See Pub. L. No. 106-185, § 21, 114 Stat. 225.

Under the new Act, the procedure established in the newly enacted 18 U.S.C. 983(e) (Westlaw 2001) is the exclusive remedy for seeking to set aside a declaration of forfeiture under a civil forfeiture statue. See 18 U.S.C. 983(e)(5) (Westlaw 2001). The new statute allows a forfeiture to be set aside on grounds of lack of notice only if the government "knew, or reasonably should have known, of the moving party's interest and failed to take reasonable steps to provide such party with notice," and "the moving party did not know or have reason to know of the seizure within sufficient time to file a timely claim." 18 U.S.C. 983(e)(1) (Westlaw 2001).

Because these new statutory provisions will govern forfeiture actions commenced on or after August 23, 2000, the question posed by petitioner with respect to past forfeitures does not present an issue of continuing significance. To the contrary, it affects only a small and rapidly diminishing number of cases and further review is unwarranted.

2. Petitioner further contends (Pet. 18-20) that the district court erred in declining to order compensation for the government's failure to return to him the automobile and the miscellaneous personal property that were not lawfully forfeited.[6] After determining that the property in question was wholly purchased with drug proceeds, however, the district court properly "decline[d] to exercise its equitable powers" to compensate petitioner. Pet. App. 4, at 12-13. As the court of appeals observed, "[s]omeone who purchases property with drug proceeds 'has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity.'" Pet. App. 5, at 5 (quoting United States v. Tilley, 18 F.3d 295, 300 (5th Cir. 1994)). Moreover, as the court of appeals held, "[t]o order compensation for destruction of this property or improper notice of forfeiture would allow [petitioner] to retain the fruits of illegal activities, his involvement in which is undisputed." Pet. App. 5, at 5.

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[6] The district court found that the government did not show that it provided sufficient notice to petitioner of the administrative forfeiture proceeding relating to the automobile. Pet. App. 4, at 9 n.9. No forfeiture proceeding was initiated with respect to the miscellaneous personal property. Id. at 2.

a. Petitioner argues that the courts below did not have jurisdiction to consider whether the car was obtained with drug proceeds because the original forfeiture of the car was void and the five year statute of limitations barred any new forfeiture proceeding. Pet. 18-19 (citing Clymore v. United States, 164 F.3d 569, 572-574 (10th Cir. 1999)). The Court recently denied certiorari on a substantially similar issue raised by petitioner in his challenge to a later forfeiture of his property. See note 3 supra. In our response to that petition (No. 99-9814), we noted a split of authority on whether a forfeiture could be reinstituted after it was set aside for lack of notice when the statute of limitations for forfeiture actions had run, compare, e.g., United States v. Dusenbery, 201 F.3d 763, 767-768 (6th Cir. 2000) (proper remedy where forfeiture set aside for inadequate notice is to provide the claimant with the right to judicially contest forfeiture), with Clymore v. United States, 164 F.3d 569, 574 (10th Cir. 1999) (where forfeiture set aside for inadequate notice, running of statute of limitations generally bars initiation of forfeiture proceeding). We contended, however, that review was not warranted because the Civil Asset Forfeiture Reform Act of 2000 resolves this issue for all forfeitures commenced after August 23, 2000. The new Act establishes that when a forfeiture is set aside for

insufficient notice, a subsequent forfeiture action may then be commenced "notwithstanding the expiration of any applicable statute of limitations." 18 U.S.C. 983(e)(2)(A) (Westlaw 2001). Because this new law resolves the conflict, and because of the other reasons discussed in our response to the petition in No. 99-9814, further review of this question is also not warranted in this case.[7]

b. Petitioner also challenges (Pet. 19-20) the factual determination below that he purchased the automobile and other personal property in question with cash obtained from drug sales. See Pet. App. 4, at 10-11 (district court finding); see also Pet. App. 5, at 4. The record, however, provides ample support for this finding. See, e.g., Pet. App. 2, at 11-12 (petitioner's admission that the property was purchased with cash from drug sales); id. at 15 (petitioner's agreement at evidentiary hearing that "all these items were bought with drug money"); id. at 16 (admission that petitioner had not been lawfully employed since 1983); id. at 22 (admission that automobile was purchased in 1985 with cash that was "probably"

[7] To the extent that petitioner's claim is based on the failure to return miscellaneous personal property that was abandoned and destroyed as evidence rather than subjected to forfeiture proceedings, petitioner cites no cases that conflict with the decision below.

proceeds from cocaine sales). In any event, the factual determination by the district court does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

WILLIAM C. BROWN
Attorney

JANUARY 2001

RESPONSE REQUESTED LB

ORIGINAL

GRANTED

Supreme Court, U.S.
FILED
JAN 26 2001
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

(4)

Case No. 00-6567

LARRY DEAN DUSENBERY,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY

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RECEIVED
JAN 30 2001

14

Questions Presented

I. SHOULD THIS COURT GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER A PRISONER MUST RECEIVE "ACTUAL NOTICE" REGARDING A FORFEITURE NOTIFICATION?

II. CAN THE GOVERNMENT FORFEIT PETITIONER'S AUTOMOBILE AND PERSONAL PROPERTY WITHOUT INSTITUTING LEGAL FORFEITURE PROCEEDINGS?

List Of Parties

All parties appear in the caption of the case on the cover page.

Table Of Contents

	Page
Questions Presented	i
List Of Parties	ii
Table Of Authorities	iv
Opinions Below	1
Statement Of Jurisdiction	2
Constitutional Provisions Involved	2
Reply	3
Reason For Granting The Writ	3
Certificate Of Service	12

Table Of Authorities

Case:	Page
Clymore v. United States, 164 F.3d 569 (10th Cir. 1999)	8, 9
Glasgow v. U.S. Drug Enforcement Administration, 12 F.3d 795 (8th Cir. 1993)	5, 8
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)	4
United States v. Clark, 84 F.3d 378 (10th Cir. 1996)	3
United States v. Dusenbery, 223 F.3d 422 (6th Cir. 2000)	3
United States v. Five Thousand Dollars in U.S. Currency, 184 F.3d 958 (8th Cir. 1999)	4
United States v. Giovanelli, 998 F.3d 116 (2d Cir. 1993)	9, 10
United States v. Giraldo, 45 F.3d 509 (1st Cir. 1995)	4, 8
United States v. Minor, 228 F.3d 352 (4th Cir. 2000)	4
United States v. One Ford Coach, 307 U.S. 219 (1939)	10
United States v. One Toshiba Color Television, 213 F.3d 147 (3d Cir. 2000)	4
United States v. Real Property, 135 F.3d 1312 (9th Cir. 1998)	3
United States v. Rodgers, 108 F.3d 1247 (10th Cir. 1997)	8
United States v. Volanty, 79 F.3d 86 (8th Cir. 1996)	8
United States v. Woodall, 12 F.3d 791 (8th Cir. 1993)	4
Weng v. United States, 137 F.3d 709 (2d Cir. 1998)	3

IN THE
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PETITION FOR A WRIT OF CERIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 5 in opening brief) is reported at 223 F.3d 422. The order of the district court (Pet. App. 4 in opening brief) is reported at 34 F.Supp.2d 602. A prior opinion of the Court of Appeals (Pet. App. 1 in opening brief) is not reported, but the judgment is noted at 97 F.3d 1451 (Table).

Jurisdiction

The judgment of the Court of Appeals was entered on July 10, 2000. (Pet. App. 5 in opening brief). A petition for rehearing or rehearing en banc was denied on August 25, 2000. (Pet. App. 6 in opening brief). The petition for a writ of certiorari was filed on October 16, 2000. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

FIFTH AMENTMENT:

No person...shall be deprived of life, liberty, or property, without due process of law....

REPLY

Reason For Granting The Writ

I. SHOULD THIS COURT GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER A PRISONER MUST RECEIVE "ACTUAL NOTICE" REGARDING A FORFEITURE NOTIFICATION?

The issue in this petition involves a split among the circuits as to whether an incarcerated prisoner must receive "actual notice" regarding a forfeiture notification. The Sixth, Ninth, and Tenth Circuits find that the government complies with due process requirements by sending a forfeiture notification to the inmate's place of incarceration, even if the prisoner may not actually have received the notice. See United States v. Dusenbery, 223 F.3d 422 (6th Cir. 2000)(this Court does not require the government to show that the mail actually reached an inmate in order to satisfy requirements of due process); United States v. Clark, 84 F.3d 378, 381 (10th Cir. 1996)(concluding that government complied with due process requirements when it sent notice by certified mail to prison where claimant was incarcerated, even if claimant may not actually have received notice); United States v. Real Property, 135 F.3d 1312, 1315-16 (9th Cir. 1998)(same). The First, Second, and Eighth Circuits find that a corrections officer's signature is less than reliable assurance that the incarcerated property owner has received actual notice. See Weng v. United States, 137 F.3d 709, 714-715 (2d Cir. 1998)([w]e do not agree that a federal agency's mailing

of a notice of forfeiture to a federal correctional institution where the property owner is detained constitutes adequate notification of the forfeiture if the notice is not in fact delivered to the prisoner-owner..." "[T]he mere mailing of notice -- even with a required return receipt signed not by the addressee but by the institution -- does not satisfy the requirement of Mullane[1/] that the means of giving notice 'be such as one desirous of actually informing [the owner] might reasonably adopt'"); United States v. Giraldo, 45 F.3d 509, 511 (1st Cir. 1995) (If the government is incarcerating or prosecuting the property owner when it elects to impose the additional burden of defending a forfeiture proceeding, fundamental fairness surely requires that either the defendant or is counsel receive "actual notice" of the agency's intent to forfeit in time to decide whether to compel the agency to proceed by judicial condemnation); United States v. Five Thousand Dollars In U.S. Currency, 184 F.3d 958 (8th Cir. 1999); United States v. Woodall, 12 F.3d 791 (8th Cir. 1993) (same).

The Third and Fourth Circuits require evidence of proper delivery procedures within the prison. See United States v. Minor, 228 F.3d 352 (4th Cir. 2000); United States v. One Toshiba Color Television, 213 F.3d 147 (3d Cir. 2000)(en banc).

In this case, the government did not provide Petitioner with constitutionally adequate notice regarding his $21,940 in U.S.

[1] Mullane v. Central Hanover Bank & TrustCo, 339 U.S. 306 (1950).

currency. Therefore, Petitioner did not receive the forfeiture notification and was unable to object to the forfeiture of his funds. First of all, the government sent notice to the wrong Post Office Box number. (Appendix 1 at 3 in opening brief). The address at the prison where Petitioner was at -- FCI Milan -is P.O. Box 1000. The government sent notice to P.O. Box 100. (Appendix 3 at 6-8 in opening brief). Moreover, James Lawson -- the prison mail clerk -- admitted it was possible the signature on the certified mail receipt could be scmeone else's. (Appendix 3 at 6-8 in opening brief). Additionally, the certified mail receipt has an illegible signature. (Appendix 1 at 3 in opening brief). Furthermore, even if it was Mr. Lawson's signature on the certified mail receipt, Mr. Lawson stated he could not prove the mail was ultimately forwarded to Petitioner because the institution destroyed all of their log books. (Appendix 3 at 6-8 in opening brief). Finally, although the government published notice in the Cleveland Plain Dealer in Cleveland, Ohio, Petitioner was incarcerated in Milan, Michigan and certainly was not going to see a publication in an Ohio newpaper. (Appendix 1 at 3 in opening brief). The government knew Petitioner was incarcerated in Michigan because the government prosecuted Petitioner and put him there. Thus, the Sixth Circuit's opinion is in error. The forfeiture is void and Petitioner's funds should be returned to him because the statute of limitations has expired for the government to initiate legal forfeiture proceedings. See Glasgow v. United States Drug Enforcement Admin., 12 F.3d 795,

799 (8th Cir. 1993)(administrative forfeiture void due to defective notice; case remanded to vacate forfeiture and to order DEA either to return the property or initiate judicial forfeiture proceedings); Clymore v. United States, 164 F.3d 569, 572-574 (10th Cir. 1999) (If the five-year statute of limitations has expired, the government is precluded from initiating judicial forfeiture proceedings).

The above proceedings are exactly what the Fifth Amendment to the United States Constitution forbids, the taking of Petitioner's property without due process of law.

The government claims in a footnote on page 8 of its brief, that the evidence showed that the incorrect address was sufficient in that the notice was in fact received at the Milan FCI where it was signed for by the appropriate prison official. The government is wrong.

In addition to an incorrect address, the certified mail receipt has an illegible signature. (Appendix 3 at 6-8 in opening brief). This is probably the signature of the individual who owned P.O. Box 100, not the signature of prison staff at P.O. Box 1000. Moreover, prison employees will support government attorneys because they work for the same government. Allowing anything less than "actual notice" would be granting the government a windfall. Prison officials can throw away the forfeiture notification -- at the FBI or DEA's request -- and then support the U.S. Attorney's Office by claiming the mail was delivered. The government would be able to take any prisoner's property without due process.

Additionally, the government argues that Petitioner should not have waited as long as he did to move for return of his property because the prison log books would have provided information regarding the delivery of the certified mail notice. (Government's brief at 10). This is wrong.

First of all, because Petitioner did not receive notification, he was unaware that the government forfeited his property. Second, the prison log books are destroyed after one (1) year. (Appendix 3 at 8 in opening brief).

Finally, the government claims that because of new statutory provisions, this issue will only effect a small and rapidly diminishing number of cases, therefore, further review is unwarranted. (Government's brief at 11). The government is wrong.

There are literally thousands of cases under the old system still going through the forfeiture process. Thus, this argument must fail.

Because of the split in the circuits, and because the government has taken Petitioner's property in violation of his Fifth Amendment due process rights, this court should grant certiorari, reverse the lower court, and order Petitioner's funds returned to him.

II. CAN THE GOVERNMENT FORFEIT PETITIONER'S AUTOMOBILE AND PERSONAL PROPERTY WITHOUT INSTITUTING LEGAL FORFEITURE PROCEEDINGS?

The government confiscated Petitioner's 1984 Monte Carlo without providing Petitioner with due process of law. This was established

in prior proceedings. (Appendix 1 at 4 in opening brief). Thus, the forfeiture is void. See United States v. Giraldo, 45 F.3d 509, 512 (1st Cir. 1995)("If the notice turns out to have been inadequate, the forfeiture is void"); United States v. Rodgers, 108 F.3d 1247, 1255 (10th Cir. 1997); Clymore v. United States, 164 F.3d 569, 572 (10th Cir. 1999). Therefore, the district court could only order the automobile returned or direct the government to initiate judicial forfeiture proceedings. United States v. Volanty, 79 F.3d 86, 88 (8th Cir. 1996)(noting that "[w]hen an administrative forfeiture is void for lack of notice, a district court must set aside the forfeiture declaration and order DEA either to return [the] property or commence judicial forfeiture in the district court"); Glasgow v. United States Drug Enforcement Admin., 12 F.3d 795, 799 (8th Cir. 1993). Moreover, the five-year statute of limitations expired, therefore, the government is precluded from initiating judicial forfeiture proceedings. See Clymore v. United States, 164 F.3d 569, 572-574 (10th Cir. 1999).

The Sixth Circuit ruled that because Petitioner stated during an evidentiary hearing that the 1984 Monte Carlo may have been purchased with drug proceeds, the district court did not have to order the automobile returned. (Appendix 5 in opening brief). This ruling is in error. The district court did not have jurisdiction to do anything but order Petitioner's vehicle returned to him or direct the government to initiate judicial forfeiture proceedings because there was absolutely no forfeiture proceedings before the

court. Because the five-year statute of limitations expired (see Clymore, supra, the district court's only option was to direct the government to return Petitioner's vehicle. The government lost its opportunity to forfeit the vehicle as drug proceeds when it failed to initiate legal forfeiture proceedings. See United States v. Giovanelli, 998 F.2d 116 (2d Cir. 1993)(The forfeiture statutes impose no duty on a defendant to prevent the government from losing its rights through carelessness).

The above proceedings are exactly what the Fifth Amendment forbids. The taking of Petitioner's property without due process of law. If the government is able to take Petitioner's automobile without any forfeiture proceedings initiated, then the forfeiture statutes are useless. We would not even need any forfeiture statutes.

Additionally, as to Petitioner's personal property, the government did not initiate any forfeiture proceedings. (Appendix 1 at 4 in opening brief). (Also see list of personal property at Appendix 2, pp. 6-10). Therefore, Petitioner should have been compensated for the destruction of his personal property because the district court was without jurisdiction to order it forfeited.

Further, the government argues that Petitioner admitted that he purchased all of his personal property with drug proceeds. (Government brief at 14). This is wrong. Moreover, there is an error in the Sixth Circuit's ruling. Petitioner only claimed to have purchased two items with drug proceeds. The transcript states:

THE COURT: Well, what was bought by drug money and

what wasn't bought by drug money?
Can you go through the listing and indicate that to me? When you say "drug money," you mean the proceeds from the sale of drugs contrary to law?

MR. DUSENBERY: Yes.

THE COURT: All right.

MR. DUSENBERY: The cellular One Telephone.

THE COURT: Well, why don't you just number them by the number.

MR. DUSENBERY: Number 1.

THE COURT: Okay.

MR. DUSENBERY: Number 9, Realistic Pro Scanner. I believe that's all.

(Appendix 2 at 15-16). The government lost its opportunity to forfeit Petitioner's personal property as drug proceeds when it failed to initiate forfeiture proceedings. See United States v. Giovanelli, 998 F.3d 116 (2d Cir. 1993)(The forfeiture statutes impose no duty on a defendant to prevent the government form losing its rights through carelessness). The government cannot justify retroactive destruction of the property. How the property was obtained is irrelevant. If the government wanted to obtain forfeiture of the property as drug proceeds, it had to follow the proper channels established by Congress through the forfeiture statutes. See United States v. One Ford Coach, 307 U.S. 219, 226 (1939)(The forfeiture statutes give the government vast and important powers, but they must be exercised in the precise manner the statutes provide). Here, the government did not exercise the statutes at all.

Because the government has taken Petitioner's automobile and personal property without instituting legal forfeiture proceedings, this court should grant certiorari, reverse the lower court, order Petitioner's automobile returned and compensation for his personal property.

Conclusion

Because of the split in the circuits and the important Federal question regarding Petitioner's automobile and personal property, the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

/s/_____
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CERTIFICATE OF SERVICE

It is HEREBY CERTIFIED that a copy of the foregoing this ____ day of _____, 2001, was served upon the following:

Office of the Solicitor General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

/s/_____
Larry Dean Dusenbery

(5)

Supreme Court, U.S.
FILED
MAY 10 2001
OFFICE OF THE CLERK

No. 00-6567

IN THE

Supreme Court of the United States

LARRY DEAN DUSENBERY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED: OCTOBER 16, 2000
CERTIORARI GRANTED: FEBRUARY 26, 2001

TABLE OF CONTENTS

	Page
Relevant docket entries	
United States District Court for the Northern District of Ohio, Case No. CR86-102A	1
United States District Court for the Northern District of Ohio, Case No. 95-CV-1872	7
United States Court of Appeals for the Sixth Circuit, Case No. 95-4188	8
United States Court of Appeals for the Sixth Circuit, Case No. 99-3148	10
Affidavit of Steven Pyles (attached to Government's Response), filed June 1, 1995	13
Order of Sixth Circuit, Case. No. 95-4188, filed Sept. 27, 1996	31
Declaration of James Lawson (Exhibit 2 to Plaintiff's Response to Defendant's Motion for Summary Judgment Together with Plaintiff's Motion to Dismiss), filed Dec. 16, 1996	36
Plaintiff's Response to Defendant's Requests for Admission, filed Feb. 20, 1997	39
Affidavit of Larry Dean Dusenbery (Exhibit C to Motion for Summary Judgment), filed March 26, 1997	44
Transcript of Telephone Deposition of James Lawson, filed July 23, 1997	46
Opinion and Order granting motion of United States for summary judgment, filed January 19, 1999	55
Opinion of Sixth Circuit, Case No. 99-3148, filed July 10, 2000	67

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

CR-86-102A

LARRY DEAN DUSENBERY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

[Criminal Docket Cover Sheet Omitted]

DATE	NO.	PROCEEDINGS
4-29-86	1	MINUTES of Proceedings filed. Initial Appearance held. Counsel retained, Request of defendant for a continuance to prepare for a pretrial detention hearing. Pretrial Detention Hearing set for 5-6-86 at 11:00 a.m. Laurie, M. Time: 15 minutes Tape #86-24(072-147) (p 1)
6-24-86	25	MINUTES of proceedings filed. Dowd, J. Zengler, r. Plea of not guilty withdrawn, plea of guilty entered to Count I of indictment. Plea agreement that remaining count be dismissed at sentencing approved by the Court. (Count II) Referred for pre-sentence investigation. Plea agreement placed on the record reflecting this case and CR86-154A: 1. 12 year cap. 2. sentences to run concurrent. 3. Deft. plea to information in CR86-154A and to Count I in CR86-102A. Count II to be dismissed at time of sentencing. Sentencing set for 7-15-86 at 1:00 p.m. Time: 30 min. (1 p)

DATE	NO.	PROCEEDINGS
7-15-86	30	MINUTES of proceedings filed. Dowd, J. Nunes, r. Sentence: 12 yrs. custody of AG with a special parole term of 6 yrs. to follow. Upon motion of AUSA, Count II of indictment dismissed. Deft. advised of special parole term of 6 yrs. Conferred with counsel and decided to remain on his plea of guilty. Obj. re: presentence report were denied. Oral motion for recommendation for Lexington granted. Time: 30 min. (1 p)
7/28/88	36 37	MOTION of pltf for Court order to destroy seized evidence w/brf. c/m 7/26/88. (3 p) jp
8/10/88	37 36	ORDER that the FBI be permitted to destroy seized evidence presently in their custody as a result of a saizure which took place at 396 Porter Road, Atwater, OH on 4/23/86. DDD EOD:8/10/88. c/m 8/10/88. (1 p) jp
11/12/93	74 115 116	MOTION of dft for retn of property, 116 w/brf & exhs. c/m 11/2/93. (9 p) jp
4/28/94	85	RESPONSE of govt to dft's mot for retn of property. c/m 4/28/94. (2 p) jp
5/9/94	86	REPLY of dft to govt's resp to dft's mot for retn of property w/affvt. c/m 5/9/94. (4 p) jp
5/20/94	88	ORDER that the govt is requested to file a suppl brf by 6/8/94 in resp to dft's mot for retn of all property & funds seized. Dowd, J. c/m 5/20/94. (2 p) fm
7/19/94	92	RESPONE of govt to dft's mot for retn of all property & funds seized. w/attachments c/m 7/19/94 (108p)pm

DATE	NO.	PROCEEDINGS
8/1/94	93	REPLY of dft to govt's resp to dft's mot for retn of all property & funds seized. c/m 7/25/94 (4 p) pm
8/24/94	96	SUPPLEMENTAL REPLY of dft to govt's supplemental resp to dft's mot for retn of all prop & funds seized. c/m 8/21/94 (4 pgs) tl
2/8/95	99	MOTION of dft for lv to suppl F.R.Cr.P. 41(e) mot (attached). c/m 2/4/95. (2 pgs) jr
2/28/95	100	ORDER granting dft's mot for lv to suppl his mot; Ct req govt to suppl resp filed 7/15/94 indicating if a forfeiture action was filed w/respect to currency & if so case number of forfeiture action; if no action to forfeit currency has been filed, Ct req a brf setting forth reasoning of govt as to why Ct should not ord currency retnd to dft; Ct req that suppl be filed by 3/17/95. Dowd, J. c/m2/28/95. (2 pgs) jr
3/15/95	103	SUPPLEMENTAL Response of govt ex/exh. c/m 3/15/95. (40 pgs) jr
3/23/95	104	SUPPLEMENTAL Reply by dft to govt's suppl resp dated 3/15/95. c/m 3/19/95. (3 pgs) jr
4/13/95	105	ORDER directing counsel for govt to file suppl memo on challenged iss of actual ntc, the statutory authority for administrative forfeiture, double jeopardy iss & given fact of forfeiture, does Ct have jurisdiction to adjudicate dft's challenge to the accomplished forfeiture in the confines of cr case or is dft obligated to file a new civil action to re-

DATE	NO.	PROCEEDINGS
		cover currency on claim that forfeiture action is fatally flawed for lack of ntc; Ct req that said resp by filed by 5/5/95 & dft has lv to file memo in opp by 5/19/95. Dowd, J. c/m 4/13/95. (2 pgs plus 3 pg attachment) jr
6/1/95	109	RESPONSE of govt (re: forfeiture) w/affdvt & exh. c/m 5/31/95. (21 pgs) jr
6/16/95	110	REPLY of dft to govt's 6/1/95 resp w/exh. c/m 6/12/95. (35 pgs) jr
7/19/95	111	REPLY of dft to govt's 7/12/95 suppl citation. c/m 6/16/95. (3 pgs) jr
7/12/95	112	SUPPLEMENTAL CITATION of govt. c/m 7/12/95 (2 pgs)
8/14/95	113	SUPPLEMENTAL CITATION of dft in supp of mot for retn of property. c/m 8/9/95. (2 p) fm
10/5/95	115 74	MEMORANDUM OPINION denying dft's mot for retn of property; the court finds that it lacks jurisdiction for the mot. Dowd, J. c/m 10/5/95. EOD: 10/6/95. (memo 11 p; attach 13 p) fm
10/5/95	116 74	JUDGMENT ENTRY that the dft's mot for retn of property is denied; case dism; case closed. Dowd, J. c/m 10/5/95. EOD: 10/6/95. (1 p) fm (5:95cv1872)
10/27/95	117	NOTICE OF APPEAL by Larry Dean Dusenberry to the USCA for the 6th circuit re judg [116] & [115]. Notice to counsel, USCA & petit. (2 pgs) Fee not required. cm: 5:95CV1872.

DATE	NO.	PROCEEDINGS
11/20/96	125 127	TRUE COPY of mandate from the USCA for the 6th Circuit vacating the District Court's judg & remanding the case for further proceedings [0-1]. Clerk, Green; Guy, Ryan & Moore, Circuit Judges; Dt issd 11/18/96. Filed 9/25/96; USCA #95-4188. (1 pg)
2/20/97	135	RESPONSE of pla USA to dft's req for prodctn of docmts w/exhs. c/m 2/20/97. (8 p) (5:95cv1872) fm
2/20/97	136	RESPONSE of pla USA to dft's interr. c/m 2/20/97. (7 p) (5:95cv1872) fm
2/20/97	137	RESPONSE of pla USA to dft's reqs for adms. c/m 2/20/97. (5 p) (5:95cv 1872) fm
3/26/97	138	MOTION by dft for SJ w/brf & exh. c/m 2/14/97. (33 pgs) (5:95cv1872) jr
3/28/97	139	MOTION by pla for SJ & RESPONSE to dft's mot for SJ w/exh. c/m 3/27/97. (19 pgs) (5:95cv1872) jr
7/25/97	147	TRANSCRIPT of evidentiary hrg before Hon David D. Dowd, Jr. on 7/23/97 at 7:55 a.m. Court Reporter: Caroline Mahnke. (22 p) (5:95cv1872) fm
7/25/97	148	TELEPHONE DISPOSITION of James Curtis Lawson on 7/23/97 at 10:30 a.m. before Hon David D. Dowd, Jr. Court Reporter: Caroline Mahnke. (11 p) (5:95cv1872) fm
8/13/97	152	SUPPLEMENTAL MOTION of petr for SJ w/brf. c/m 8/11/97. (7 p) (5:95cv1872) fm

DATE	NO.	PROCEEDINGS
8/20/97	154	SUPPLEMENTAL brf of pla w/respect to its mot for SJ w/exhs. c/m 8/20/97 (20 p) fm (5:96cv1872)
9/2/97	158	SUPPLEMENTAL brf by dft as to whether certain items may be forfeited as drug proceeds. c/m 8/28/97. (5:95cv1872) fm
3/30/98	173	SUPPLEMENTAL pldg by petr to forfeiture action based on new case law w/exh. c/m 3/28/98. (6pgs) (5:95cv1872) jr
4/6/98	174	RESPONSE by govt to pla's suppl pldg to forfeiture action based on new case law w/exh. c/m 4/3/98. (5 pgs) (5:95cv1872) jr
4/9/98	175	REPLY by petr to govt's resp to suppl pldg to forfeiture. c/m 4/9/98. (2 pgs) (5:95cv1872) jr
7/6/98	176	SUPPLEMENT by petr to forfeiture case based on new case law w/exh. (2 pgs, 2 pgs exh) c/m 6/30/98. (5:95cv1872) jr
1/19/99	180	OPINION and Order granting motion of USA (doc 139) for SJ. Gwin, J. (EODL: 1/20/99) issd: 1/19/99 13pgs
1/19/99	181	ORDER that this Ct grants USA's motion for summary judgment and denies deft, Dusenbery's mot for SJ. Gwin, J. issd: 1/19/99 (EOD: 1/20/99) vk
1/29/99	182	NOTICE OF APPEAL to the USCA fore the 6th Circuit by petr re ord [180] & ord [181]. Fee not paid. (5:95CV1872) cmr (2 pgs)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO (Akron)

Civil Docket for case #: 95-CV-1872

LARRY DEAN DUSENBERY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

Filed: 08/23/95
Assigned to Judge James S. Gwin
Demand: $0,000
Nature of Suit: 890
Lead Docket: None
Jurisdiction: US Defendant
Dkt # in USDC/NDOH: IS 5:86cr102
Cause: 12:1441 Replevin; Action to recover property

[Case style, parties and counsel omitted]

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
11/12/93	—	MOTION by movant for order for return of property w/brf & exhs in supp. (9 pgs) (tl) [Entry date 08/24/95]
8/24/95	—	PLEASE REFER TO CRIMINAL DOCKET NO. 5:86cr102 FOR ALL FURTHER DOCKET ENTRIES (tl)

GENERAL DOCKET
US COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Court of Appeals Docket #: 95-4188 Filed: 11/2/95
Nsuit: 2890 Other Statutory Actions
Dusenberry v. USA
Appeal from: Northern District of Ohio at Akron

Case type information:
1) Civil
2) United States as party
3) federal question

Lower court information:

District: 0647-5 : 95-01872
Trial Judge: David D. Dowd, Jr., Senior District Judg
Date Filed: 8/23/95
Date order/judgment: 10/5/95
Date NOA filed: 10/27/95

Fee status: in forma pauperis

Prior cases: None
Current cases: None

[Case style, parties, and counsel omitted]

DATE	PROCEEDINGS
11/2/95	Civil Case Docketed. Notice filed by Appellant Larry Dean Dusenberry. Transcript needed: n 1915a pending in dist. ct. (mmd)
12/26/95	BRIEF filed by pro se appellant Larry Dean Dusenberry and served by deputy. Copies: 5. Certificate of service date 12/21/95 Number of Pages: 10. [95-4188] (vf)

DATE	PROCEEDINGS
1/26/96	Request to waive oral argument and submit case on the briefs, (waiver on page: v), filed by Gregory C. Sasse for Appellee USA [95-4188] (vf)
1/29/96	BRIEF filed by Gregory C. Sasse for Appellee USA. Copies: 5. Certificate of service date 1/26/96. Number of Pages: 10. [95-4188] (vf)
2/12/96	REPLY BRIEF filed by pro se appellant Larry Dean Dusenberry and served by deputy. Copies: 5. Certificate of service date 2/4/96 [95-4188] (vf)
3/4/96	Appellant MOTION filed to order the United States Attorney to File the Joint Appendix. [1287137-1]. Motion filed by Larry Dean Dusenberry for Appellant Larry Dean Dusenberry. Certificate of service date [95-4188] (tmb)
3/21/96	APPENDIX filed by Gregory C. Sasse for Appellee USA. Copies: 5. Certificate of service date 3/20/96 [95-4188] (vf)
9/25/96	ORDER filed: VACATED and remanded [95-4188], pursuant to local rule 9(b)3 [95-4188], decision not for publication pursuant to local rule 24 [95-4188] . Ralph B. Guy, Circuit Judge, James L. Ryan, Circuit Judge, Karen N. Moore, Circuit Judge. (mmd)
11/18/96	MANDATE ISSUED with no cost taxed [95-4188] (vf)

GENERAL DOCKET

US COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Court of Appeals Docket #: 99-3148 Filed: 2/4/99
Nsuit: 1890 Other Statutory Actions
USA v. Dusenbery
Appeal from: Northern District of Ohio at Akron

Case type information:
1) Civil
2) United States as party
3) federal question

Lower court information:

District: 0647-5: 95-01872
Trial Judge: James S. Gwin, U.S. District Judge
Court Reporter: Richard Delmonico
Date Filed: 8/23/95
Date order/judgment: 1/19/99
Date NOA filed: 1/29/99

Fee status: in forma pauperis

Prior cases:
95-4188
Date Filed: **/**/** Date disposed: **/**/** Disposition:

Current cases: None

[Case style, parties, and counsel omitted]

DATE	PROCEEDINGS
2/4/99	Civil Case Docketed. Notice filed by Appellant Larry Dean Dusenbery. Transcript needed: n (mmd)

DATE	PROCEEDINGS
5/17/99	BRIEF filed by pro se appellant Larry Dean Dusenbery and served by deputy. Copies: 4. Certificate of service date 5/14/99 Number of Pages: 50. [99-3148] (vf)
6/15/99	BRIEF filed by Herbert J. Villa for Appellee USA. Copies: 7. Certificate of service date 6/14/99. Number of Pages: 11. [99-3148] (vf)
6/15/99	Request to waive oral argument and submit case on the briefs, (waiver on page: v), filed by Herbert J. Villa for Appellee USA [99-3148] (vf)
7/12/99	REPLY BRIEF filed by pro se appellant Larry Dean Dusenbery and served by deputy. Copies: 5. Certificate of service date 7/9/99 [99-3148] (vf)
7/20/99	APPENDIX filed by Herbert J. Villa for Appellee USA. Copies: 5. Certificate of service date 7/19/99 [99-3148] (vf)
7/10/00	Per Curiam OPINION filed: AFFIRMED [99-3148], decision not for publication pursuant to local rule 28(g) [99-3148]. Boyce F. Martin, Circuit Judge, Harry W. Wellford, Circuit Judge, Alice M. Batchelder, Circuit Judge. OPINION PUBLISHED 8/10/00 per 8/1/00 Order of the Court. (mmd)
7/21/00	PETITION for en banc rehearing filed by Larry Dean Dusenbery for Appellant Larry Dean Dusenbery. Certificate of service date 7/20/00. [99-3148] (blh)
8/25/00	ORDER filed denying petition for en banc rehearing [2191420-1] filed by Larry Dean Dusenbery [99-3148]. Boyce F. Martin, Harry W. Wellford, Alice M. Batchelder, Circuit Judges. (blh)
9/5/00	MANDATE ISSUED with no cost taxed [99-3148] (dac)

DATE	PROCEEDINGS
10/20/00	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Larry Dean Dusenbery. Filed in the Supreme Court on 10-16-00, Supreme Ct. case number: 00-6567. [99-3148] (swh)
3/2/01	U.S. Supreme Court letter filed granting petition for writ of certiorari [2241799-1] filed by Larry Dean Dusenbery [99-3148]. Filed in the Supreme Court on 02-26-01. (swh)

STATE OF OHIO)
) SS: AFFIDAVIT
CUYAHOGA COUNTY)

I, STEVEN PYLES, being first duly sworn under oath say:

1. I am a paralegal specialist of the Federal Bureau of Investigation assigned to the Cleveland field office. As a part of my official duties, I handle asset forfeiture matters.

2. I have reviewed the forfeiture filed for a Larry Dusenberry which indicate that $21,939.00 in United States currency was forfeited from Mr. Dusenberry.

3. Attachment no. 1 is the Declaration of Forfeiture which indicates that the currency in question was forfeited by the Federal Bureau of Investigation.

4. Attachment no. 2 documents the fact that the F.B.I. relinquished these funds to the Marshal's Service pursuant to forfeiture procedures.

5. Attachment no. 3 documents the Marshal's Service deposit of the money into an asset forfeiture fund account.

6. Attachment no. 4 is the letter which was sent as Notice of Forfeiture.

7. Attachment no. 5 is a copy of the green card on the return receipt which documents that the letter was sent to Larry Dusenberry in the Federal Correctional Facility, Milan, Michigan.

8. Attachment no. 6 is a copy of the green card indicating delivery of the letter to Larry Dusenberry at the 1484 State Rte. 44, Randolf, Ohio address which was signed for by Edward Clause.

9. Attachment no. 7 is a copy of the certified mail envelope indicating that the letter sent to Larry Dusenberry at the 396 Porter Road, Atwater, Ohio address was unclaimed.

10. Attachment no. 8 is a copy of the Advertising Order that the F.B.I. would use to advertise the notice in the *Plain Dealer*.

11. Attachment no. 9 indicates that the notice was run in the *Plain Dealer* on November 20, 1988.

12. Attachment no. 10 indicates that the notice was run in the *Plain Dealer* on November 28, 1988.

13. Attachment no. 11 indicates that the notice was run in the *Plain Dealer* on December 4, 1988.

14. Based on the above, Affiant states that the F.B.I. asset forfeiture file indicates administrative forfeiture of the currency belonging to Larry Dusenberry pursuant to valid notice by virtue of certified mail and advertising in the *Plain Dealer*.

Further Affiant sayeth naught.

/s/ Steven Pyles
STEVEN PYLES

SWORN TO BEFORE ME and subscribed in my presence this 31st day of May, 1995.

/s/ Marguerite V. Vaiginis
Notary Public

Marguerite V. Vaiginis, Notary Public
STATE OF OHIO—Cuyahoga County
My Commission Expires 10/13/97

[Logo] Attachment #1

U.S. Department of Justice
Federal Bureau of Investigation
Washington, D.C. 20535

DECLARATION OF FORFEITURE

SEIZURE NUMBER: 3170-89-006

On April 23, 1986 the property described below was taken into custody by the Federal Bureau of Investigation for civil forfeiture at Atwater, Ohio, pursuant to Title 21, USC, 881 (6). The initial seizure of the property by _____ occurred on _____ at _____. Notice of this action was sent to all known parties who may have a legal or possessory interest in the property. On November 20, 27, and December 4, 1988, notice of this action was published in The Plain Dealer, Cleveland, Ohio in accordance with 19 USC § 1607.

(Description of Property)

$21,939 in US Currency

As of the date of execution of this form, a petition for remission or mitigation of forfeiture for this property ☐ has ☒ has not been received.

No claim was filed for the property within 20 days from the date of first publication of the advertisement as required. It is hereby declared that the property has been forfeited to the United States under 19 USC § 1609.

/s/ [illegible]

Property Management Officer
Federal Bureau of Investigation

1/27/89
Date

Attachment # 2

[Logo] UNITED STATES MARSHALS SERVICE
NORTHERN DISTRICT OF OHIO
SEIZED PROPERTY AND EVIDENCE CONTROL

Received From (Name and address): William A. Lehr, 1240 E 9th st., Clev., Ohio 44199

Case No.: 3170-80-F-6

Case Title: USA vrs. Larry Dean Dusenberry

Subject (Name, address): Larry Dean Dusenberry, 396 Porter Rd.

Item No.: 1

Qty.: 1

Description of Articles: $21,939.00 in U.S. Currency

Storage Location: Deposited into 15x6874.

I certify that I have received and hold myself accountable for the articles listed above:

Name & Title: Jerry Sidloski, Supv. Accy.

Agency: USMS

Date: 12/13/88

Signature: Jerry Sidloski

CHAIN OF CUSTODY

Item No.: 1

Date: 12-13-88

Relinquished By: Name & Agency: William A. Lehr, FBI

Signature: William A Lehr

Received By: Name & Agency: Jerry Sidloski, USMS

Signature: Jerry Sidloski

Purpose: Transfer custody. Deposited into 15x6874.

Attachment #3

UNITED STATES MARSHALS SERVICE

No. E009613

Form USM-303
(Rev. 7/20/78)

PRIOR EDITIONS
MAY BE USED

RECEIPT

UNITES STATES MARSHAL
NORTHERN DISTRICT OF OHIO

1. Received of: Willaim Lehr, FBI, Cleveland, Ohio

2. Date: December 13, 1988

3. Court/Case Number or purpose of collection: Seized Money Under FBI Case Number 3170-89-F-006

Deposited into 15x6874

4. Amount: $21,939.00

5. Total: $21,939.00

6. Received by (U.S. Marshals Service Official): Jerry Sidloski.

Attachment #4

NOVEMBER 7, 1988
CERTIFIED RETURN RECEIPT

MR LARRY DUSENBERRY
396 PORTER ROAD
ATWATER, OH 44201 RE: 3170-89-F-0006

DEAR MR DUSENBERRY:

On APRIL 23, 1986, property was seized by the Federal Bureau of Investigation (FBI) at ATWATER, OHIO for forfeiture for violation of THE CONTROLLED SUBSTANCES ACT. The property was appraised at $21,939 and is described as follows:

$21,939.00 IN U.S. CURRENCY

This forfeiture is being conducted pursuant to Title 21, United States Code (U.S.C.), Section 881 and the following additional federal laws and regulations: 19 U.S.C., Sections 1602-1619, and Title 21, Code of Federal Regulations (C.F.R.), Sections 1316.71-1316.81.

You may contest the seizure and forfeiture of this property and/or petition to the FBI and request a pardon of the forfeited property.

To Contest the Forfeiture

If you want to contest the seizure or forfeiture of the property in court, you must file a claim of ownership and a bond in the amount of $2,193 with the FBI by DECEMBER 19, 1988. The bond may be in cash or a cashier's check payable to the U.S. Department of Justice or provide a surety.

If you are indigent (needy and poor), you may not have to post the bond. To request a waiver of the bond, you must fully disclose your finances in a signed statement called

"Declaration in Support of Request to Proceed in Forma Pauperis." You can obtain this form from the FBI Field Office listed below. File the signed declaration and a claim of ownership of the property with the FBI by DECEMBER 19, 1988.

To Request a Pardon of the Property

If you want to request a pardon of the forfeited property, submit a petition for remission or mitigation of the forfeiture (an original and two copies) to the FBI Field Office identified below. This petition must include proof of your ownership interest in the property and the facts and circumstances which you believe justify return of the property or return of your interest in the property. For the regulations pertaining to remission or mitigation of the forfeiture, see 28 C.F.R., Sections 9.1-9.7, dated August 7, 1987 as amended in 52 Federal Register 32785, dated August, 31, 1987. The criteria for requesting remission of the forfeiture are found at 28 C.F.R., Sections 9.5(b)(l),(2),(3),(4), and (5). The criteria for requesting mitigation of the forfeiture are found at 9.5(c). You should file the petition within thirty (30) days following receipt of the mailed notice of seizure.

Where to Submit Correspondence

The seizure number 3170-89-F-0006 has been assigned to this forfeiture action. Use this number to identify the property when submitting the claim, petition or other correspondence to the FBI.

Submit all documents to this FBI Fieid Division:

CLEVELAND DIVISION
1240 EAST 9TH STREET
FED OFFICE BLDG RM. 3005
CLEVELAND, OH 44199
ATTENTION: FORFEITURE ANALYST
216-522-1400

Sincerely Yours,

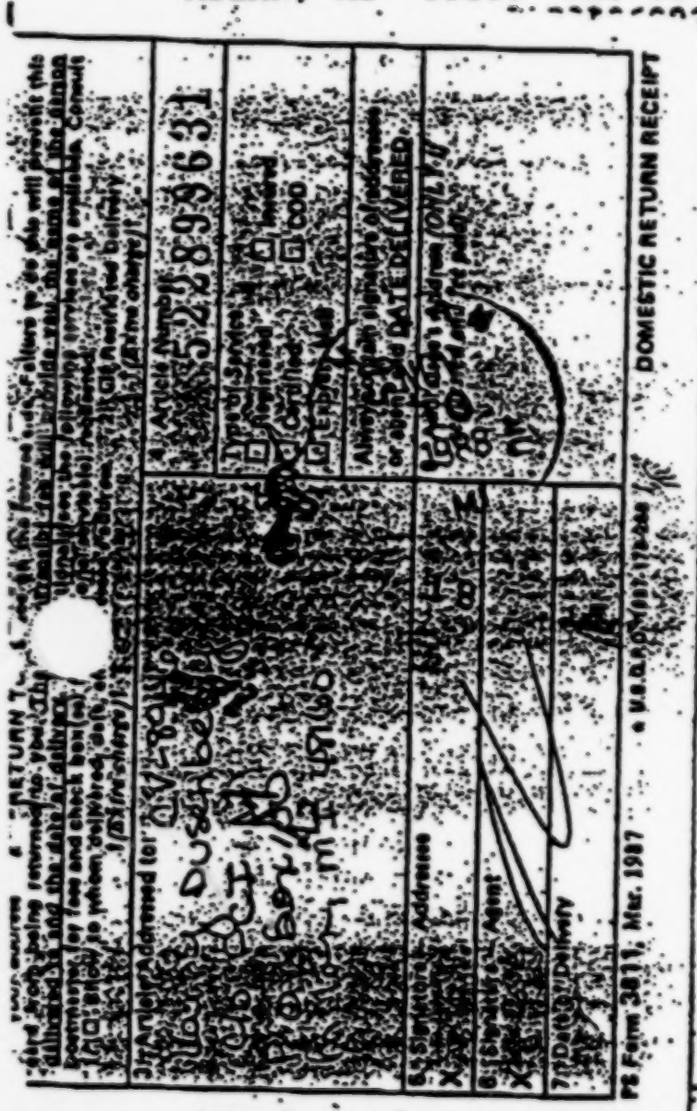
Paul V. King, Jr.
Unit Chief
Forfeiture and Seized Property Unit
Administrative Services Division

ERIC AUGSBERGER; ATAD, NARCOTICS
1.2A-638
SEIZURE NUMBER: 3170-89-F-0006

NOVEMBER 7, 1988

CERTIFIED RETURN RECEIPT

MR LARRY DUSENBERRY
C/O FCI
PO BOX 100
MILAN, MI 48160 RE: 3170-89-F-0006



6, property was seized by the Federal
FBI) at ATWATER, OHIO for forfeiture
ROLLED SUBSTANCES ACT. The property
and is described as follows:

.S. CURRENCY

is being conducted pursuant to Title
J.S.C.), Section 881 and the following
nd regulations: 19 U.S.C., Sections
Code of Federal Regulations (C.F.R.),
31.

the seizure and forfeiture of this
to the FBI and request a pardon of the

t the Forfeiture

contest the seizure or forfeiture of
ou must file a claim of ownership and a
,193 with the FBI by DECEMBER 19, 1988.
or a cashier's check payable to the
ce or provide a surety.

gent (needy and poor), you may not
To request a waiver of the bond, you
finances in a signed statement called
"Declaration in Support of Request to Proceed in Forma Pauperis." You can obtain this form from the FBI Field Office listed below. File the signed declaration and a claim of ownership of the property with the FBI by DECEMBER 19, 1988.

To Request a Pardon of the Property

1 - CLEVELAND (Attn: Forfeiture Analyst)
1 - Mr. King
PVK:CXB (4)

21

BEST AVAILABLE COPY

ERIC AUGSBERGER; ETAL; NARCOTICS
12A-638
SEIZURE NUMBER: 3170-89-F-0006

NOVEMBER 7, 1988

CERTIFIED RETURN RECEIPT

MR LARRY DUSENBERRY
1484 STATE ROUTE 44
RANDOLPH, OH 44265 RE: 3170-89-F-0006

DEAR MR DUSENBERRY:

986, property was seized by the Federal
(FBI) at ATWATER, OHIO for forfeiture
NTROLLED SUBSTANCES ACT. The property
and is described as follows:

U.S. CURRENCY

is being conducted pursuant to Title
U.S.C.), Section 881 and the following
and regulations: 19 U.S.C., Sections
Code of Federal Regulations (C.F.R.),
81.

the seizure and forfeiture of this
to the FBI and request a pardon of the

t the Forfeiture

contest the seizure or forfeiture of
ou must file a claim of ownership and a
,193 with the FBI by DECEMBER 19, 1988.
or a cashier's check payable to the
ce or provide a surety.

gent (needy and poor), you may not
To request a waiver of the bond, you
finances in a signed statement called
of Request to Proceed in Forma
in this form from the FBI Field Office
signed declaration and a claim of
ownership of the property with the FBI by DECEMBER 19, 1988.

To Request a Pardon of the Property

If you want to request a pardon of the forfeited property, submit a petition for remission or mitigation of the

1 - CLEVELAND (Attn: Forfeiture Analyst)
1 - Mr. King
PVK:CXB (4)

MAY 4 '95 15:30

ERIC AUGSBERGER; ETAL; NARCOTICS
12A-638
SEIZURE NUMBER: 3170-89-F-0006

NOVEMBER 7, 1988

CERTIFIED RETURN RECEIPT

-89-F-0006

property was seized by the Federal
) at ATWATER, OHIO for forfeiture
LED SUBSTANCES ACT. The property
is described as follows:

CURRENCY

being conducted pursuant to Title
C.), Section 881 and the following
regulations: 19 U.S.C., Sections
of Federal Regulations (C.F.R.),

seizure and forfeiture of this
the FBI and request a pardon of the

Forfeiture

st the seizure or forfeiture of
st file a claim of ownership and a
with the FBI by DECEMBER 19, 1988.
cashier's check payable to the
provide a surety.

(needy and poor), you may not
quest a waiver of the bond, you
nces in a signed statement called
quest to Proceed in Forma
is form from the FBI Field Office
d declaration and a claim of
h the FBI by DECEMBER 19, 1988.

rdon of the Property

st a pardon of the forfeited
or remission or mitigation of the

ure Analyst)

LARRY DUSENBERRY
396 PORTER RD.
ATWATER, OHIO 44201

23

MAY 4 '95 15:31

Attachment #8

ADVERTISING ORDER

Order No. 3170-89-006

Department or Establishment, Bureau or Office: Federal Bureau of Investigation

Date: 11/7/88

Name of the Publication Advertised in: Plain Dealer

Subject of Advertisement: U.S. Currency

Edition of Paper Advertisement Appeared: Sunday

Number of Times Advertisement Appeared: Three (3)

Dates Advertisement Appeared: 11/20, 11/27, 12/4

Specifications for Advertisement: To be published once a week on Sunday for three consecutive weeks. If your newspaper DOES NOT publish on Sunday, please publish on next available date. NOTICE OF PUBLICATION SHOULD BE SUBMITTED PROMPTLY FOLLOWING THE LAST DATE THE ADVERTISEMENT APPEARS.

Copy For Advertisement: See Attached

Authority to advertise: Number 21 CFR 1316.75

Date: 11/7/88

Signature of Authorizing Official: Paul V. King, Jr.

INSTRUCTIONS TO PUBLISHERS

Extreme care should be exercised to insure that the specifications for advertising to be set other than solid be definite, clear, and specific since no allowance will be made for paragraphing or for display or leaded or prominent headings, unless specifically ordered, or for additional space required by the use of type other than that specified. Specifications for advertising other than solid and the advertisement copy submitted to the publisher will be attached to the voucher. The following is a sample of solid

line advertisement set up in accordance with the usual Government requirements.

[Sample Illegible]

Your bill for this advertising order should be submitted on the "Public Voucher for Advertising" form, which is printed on the reverse of this form, immediately after the last publication of the advertisement. If copies of the printed advertisement are not available, complete the affidavit provided on the voucher. Submit the voucher and a copy of the printed advertisement to—

FBI, 10TH AND PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C. 20535
ATTENTION: FSPU, ROOM 6853

IMPORTANT

Charges for advertising when a ILLEGIBLE

NOV 10 1988

FBI

LEHR

On APRIL 23, 1986, at 396 PORTER ROAD, ATWATER, OHIO, agents of the Federal Bureau of Investigation (FBI) seized $21,939.00 IN U.S. CURRENCY from LARRY DUSENBERRY, for forfeiture for violation of THE CONTROLLED SUBSTANCES ACT. The property was appraised at $21,939. This forfeiture is being conducted pursuant to Title 21, United States Code (U.S.C.), Section 881 and the following additional federal laws and regulations: 19 U.S.C., Sections 1602-1619, and Title 21, Code of Federal Regulations (C.F.R.), Sections 1316.71-1316.81. You may contest the seizure and forfeiture of this property and/or petition to the FBI and request a pardon of the forfeited property. If you want to contest the seizure or forfeiture of the property in court, you must file a claim of ownership and a bond in the amount of $2,193 with the FBI by DECEMBER 19, 1983. The bond may be in cash or a cashier's check payable to the U.S. Department of Justice or provide a surety. If you are indigent (needy and poor), you may not have to post the bond. To request a waiver of the bond, you must fully disclose your finances in a signed statement called "Declaration in Support of Request to Proceed in Forma Pauperis." You can obtain this form from the FBI Field Office listed below. File the signed declaration and a claim of ownership of the property with the FBI by DECEMBER 19, 1988. If you want to request a pardon of the forfeited property, submit a petition for remission or mitigation of the forfeiture (an original and two copies) to the FBI Field Office identified below. This petition must include proof of your ownership interest in the property and the facts and circumstances which you believe justify return of the property or return of your interest in the property. For the regulations pertaining to remission or mitigation of the forfeiture, see 28 C.F.R., Sections 9.1-9.7, dated August 7, 1987 as amended in 52 Federal Register 32785, dated August 31, 1987. The criteria for requesting remission of the forfeiture are found at 28 C.F.R., Sections 9.5(b)(l),(2),(3),(4), and (5). The criteria

for requesting mitigation of the forfeiture are found at 9.5(c). You should file the petition within thirty (30) days following receipt of the mailed notice of seizure. The seizure number 3170-89-F-0006 has been assigned to this forfeiture action. Use this number to identify the property when submitting the claim, petition or other correspondence to the FBI. Submit all documents to the FBI, CLEVELAND DIVISION, 1240 EAST 9TH STREET, FED OFFICE BLDG RM. 3005, CLEVELAND, OH 44199, 216-522-1400, Attention: Forfeiture Analyst.

Attachment 9

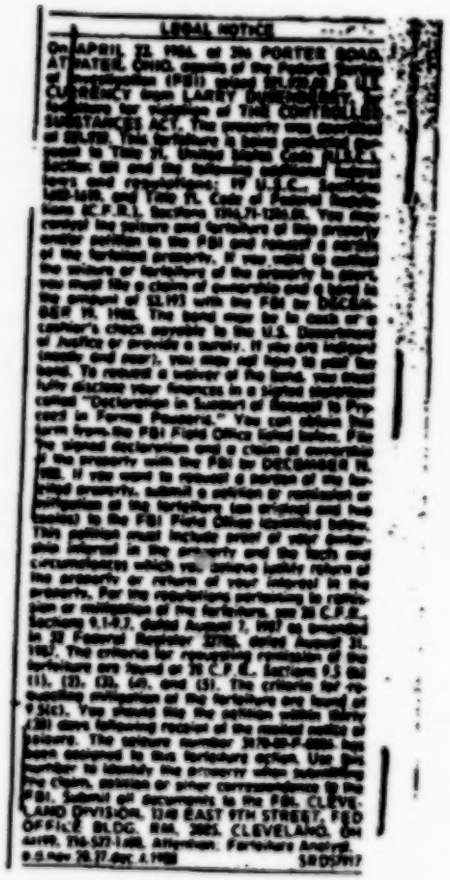
(Indicate page, name of newspaper, city and state.)
9-E, Plain Dealer, Clevela
Ohio

Date: 11-20-88
Edition: Sunday

Title: legal notice

Character:
or
Classification:
Submitting Office: Cleveland

Indexing:


LEGAL NOTICE

On APRIL 22, 1988, at 3th PORTER ROAD, AT BATES, OHIO, agents of the Federal Bureau of Investigation (FBI) seized $15,750.00 in U.S. CURRENCY from LARRY [illegible], pursuant to provisions of Title 21, CONTROLLED SUBSTANCES ACT. The property was [illegible] on $15,750. This forfeiture is being processed pursuant to Title 21, United States Code, [illegible] Section 881 and the following additional Federal laws and regulations: 18 U.S.C. Sections [illegible], and Title 28, Code of Federal Regulations (C.F.R.), Sections [illegible]. This notice [illegible] the seizure and forfeiture of this property and/or petition to the FBI and request a return of the forfeited property. If you object to [illegible] the seizure or forfeiture of the property to court, you must file a claim of ownership and a bond in the amount of $3,937 with the FBI by DECEMBER 26, 1988. The bond must be in cash or a cashier's check payable to the U.S. Department of Justice or provide a surety. If you are indigent (unable and poor), you may not have to post the bond. To request a waiver of the bond, you must fully disclose your finances in a sworn statement called "Declaration in Support of Request to Proceed in Forma Pauperis." You can obtain [illegible] form from the FBI Field Office listed below. File the signed declaration and a claim of ownership of the property with the FBI by DECEMBER 26, 1988. If you want to request a portion of the forfeited property, submit a petition or explanation of the hardship you would suffer if [illegible] forfeited and sold) to the FBI Field Office identified below. The petition must include proof of your ownership interest in the property and the facts and circumstances which you believe justify return of the property or return of your interest in the property. For the regulations pertaining to right-to-petition or mitigation of the forfeiture, see 28 C.F.R. Sections 9.1-9.7, dated August 1, 1987 as amended in 52 Federal Register 33760, dated August 31, 1987. The criteria for requesting remission of the forfeiture are found at 28 C.F.R. Sections 9.3 (i), (j), (3), (4), and (5). The criteria for requesting mitigation of the forfeiture are found at 9.5(c). You should file the petition within thirty (30) days following receipt of the mailed notice of seizure. The seizure number [illegible] has been assigned to this forfeiture action. Use this number to identify the property when submitting any claim, petition or other correspondence to the FBI. Submit all documents to the FBI, CLEVELAND DIVISION, 1240 EAST 9TH STREET, FED OFFICE BLDG. RM. 3005, CLEVELAND, OH 44199, 216-522-1400, Attention: Forfeiture Analyst. [illegible] 5805917

Attachment 10

On APRIL 22, 1988, at 304 PORTER ROAD, AKRON, OHIO, agents of the Federal Bureau of Investigation (FBI) seized $16,000 in U.S. CURRENCY from LARRY [illegible], for forfeiture for violation of THE CONTROLLED SUBSTANCES ACT. The property was recovered at $16,000. This forfeiture is being processed pursuant to Title 21, United States Code (U.S.C.), Section 881 and the customary procedures set forth in Title 18, United States Code (U.S.C.), Section 983 and the customary procedures set forth in Title 28, Code of Federal Regulations (C.F.R.), Sections 9.1-9.8. You may contest the seizure and forfeiture of this property under petition to the FBI and request a petition of the forfeited property. If you wish to contest the seizure or forfeiture of this property in court, you must file a claim of ownership and a bond in the amount of $5,000 with the FBI by DECEMBER 19, 1988. The bond may be in cash or a cashier's check payable to the U.S. Department of Justice or provide a surety. If you are indigent (needy and poor), you may not have to post the bond. To request a waiver of the bond, you must fully disclose your finances in a signed statement called "Declaration in Support of Request to Proceed in Forma Pauperis." You can obtain this form from the FBI Field Office listed below. File the signed declaration and a claim of ownership of the property with the FBI by DECEMBER 19, 1988. If you want to request a portion of the forfeited property, submit a petition or remission or mitigation of the forfeiture (pro original and two copies) to the FBI Field Office identified below. This petition must include proof of your ownership interest in the property and the facts and circumstances which you believe justify return of the property or return of your interest in the property. For the regulations pertaining to remission or mitigation of the forfeiture, see 28 C.F.R., Section 9.1-9.7, dated August 3, 1987 as amended in 52 Federal Register 33449, dated August 31, 1987. The criteria for requesting remission of the forfeiture are found at 28 C.F.R., Sections (1), (2), (3), (4), and (5). The criteria for requesting mitigation of the forfeiture are found at 9.5(c). You should file the petition within thirty (30) days following receipt of the mailing notice of seizure. The seizure number 3170-88-0008 has been assigned to this forfeiture action. Use this number to identify the property when submitting any claim, petition or other correspondence to the FBI. Submit all documents to the FBI, CLEVELAND DIVISION, 1240 EAST 9TH STREET, FED OFFICE BLDG, RM. 3005, CLEVELAND, OH 44199, 216-522-1400, Attention: Forfeiture Analyst.

SRO5917

(Indicate page, name of newspaper, city and state.)
PG. PLAIN DEALER
CLEVELAND, OHIO

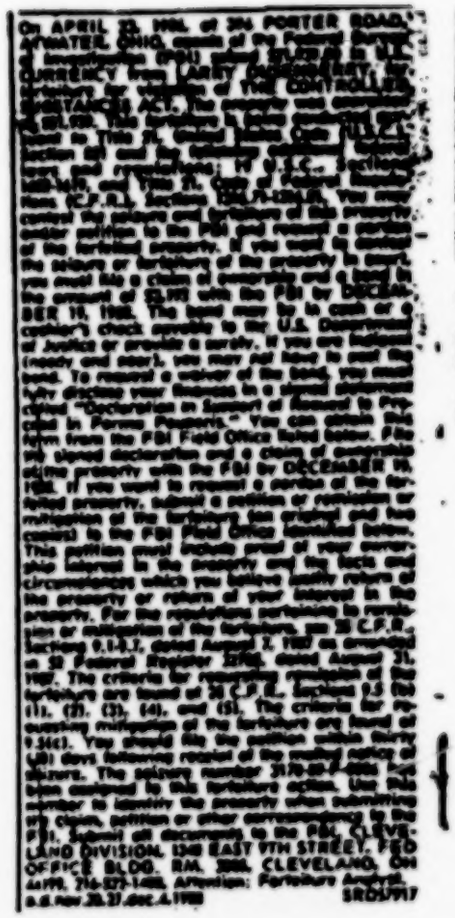
Date: 11/28/88
Edition: SUNDAY

Title: LEGAL NOTICES

Character:
or
Classification:
Submitting Office:
CLEVELAND

Indexing:

Attachment 11



On APRIL 22, 1988, at 304 PORTER ROAD, AKRON, OHIO, agents of the Federal Bureau of Investigation (FBI) seized $16,000 in U.S. CURRENCY from LARRY [illegible], for forfeiture for violation of THE CONTROLLED SUBSTANCES ACT. The property was recovered at $16,000. This forfeiture is being processed pursuant to Title 21, United States Code (U.S.C.), Section 881 and the customary procedures set forth in Title 18, United States Code (U.S.C.), Section 983 and the customary procedures set forth in Title 28, Code of Federal Regulations (C.F.R.), Sections 9.1-9.8. You may contest the seizure and forfeiture of this property under petition to the FBI and request a petition of the forfeited property. If you wish to contest the seizure or forfeiture of this property in court, you must file a claim of ownership and a bond in the amount of $5,000 with the FBI by DECEMBER 19, 1988. The bond may be in cash or a cashier's check payable to the U.S. Department of Justice or provide a surety. If you are indigent (needy and poor), you may not have to post the bond. To request a waiver of the bond, you must fully disclose your finances in a signed statement called "Declaration in Support of Request to Proceed in Forma Pauperis." You can obtain this form from the FBI Field Office listed below. File the signed declaration and a claim of ownership of the property with the FBI by DECEMBER 19, 1988. If you want to request a portion of the forfeited property, submit a petition or remission or mitigation of the forfeiture (pro original and two copies) to the FBI Field Office identified below. This petition must include proof of your ownership interest in the property and the facts and circumstances which you believe justify return of the property or return of your interest in the property. For the regulations pertaining to remission or mitigation of the forfeiture, see 28 C.F.R., Section 9.1-9.7, dated August 3, 1987 as amended in 52 Federal Register 33449, dated August 31, 1987. The criteria for requesting remission of the forfeiture are found at 28 C.F.R., Sections (1), (2), (3), (4), and (5). The criteria for requesting mitigation of the forfeiture are found at 9.5(c). You should file the petition within thirty (30) days following receipt of the mailing notice of seizure. The seizure number 3170-88-0008 has been assigned to this forfeiture action. Use this number to identify the property when submitting any claim, petition or other correspondence to the FBI. Submit all documents to the FBI, CLEVELAND DIVISION, 1240 EAST 9TH STREET, FED OFFICE BLDG, RM. 3005, CLEVELAND, OH 44199, 216-522-1400, Attention: Forfeiture Analyst.

SRO5917

(Indicate page, name of newspaper, city and state.)
10-E, Plain Dealer, Cleveland Ohio

Date: 12-4-88
Edition: Sunday

Title: legal notice

Character:
or
Classification:
Submitting Office: Cleveland

Indexing:

[Filed Sep. 25, 1996]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 95-4188

LARRY DEAN DUSENBERY,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

ORDER

Before: GUY, RYAN, and MOORE, Circuit Judges.

Larry Dean Dusenbery appeals a district court order denying his motion for return of property filed pursuant to Fed. R. Crim. P. 41(e). The case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In 1993, Dusenbery filed his Rule 41(e) motion, requesting the return of property seized by the Federal Bureau of Investigation (FBI) in April 1986. The district court determined that it lacked jurisdiction to entertain Dusenbery's motion because a Rule 41(e) motion was not the proper remedy for seeking return of his property. Consequently, the court denied the motion. Dusenbery has filed a timely appeal.

Upon review, we determine that the district court improperly concluded that it lacked jurisdiction to consider Dusenbery's Rule 41(e) motion. This court reviews a district court's determination that it lacked jurisdiction to consider a Rule 41(e) motion for an abuse of discretion. *See Frazee v. Internal Revenue Serv.*, 947 F.2.d 448, 449 (10th Cir. 1991).

The district court abused its discretion in denying Dusenbery's motion for lack of jurisdiction. In his Rule 41(e) motion, Dusenbery alleged that the defendant forfeited his property without giving him adequate notice of the forfeiture. While the district court concluded that it lacked jurisdiction because Dusenbery had not followed the procedures for seeking judicial relief set forth in the forfeiture statute and regulations, Dusenbery argues that he was unable to comply with these procedures because he never received notice of the forfeiture of his property.

Since Dusenbery was raising a due process challenge to the forfeiture, the district court had jurisdiction to consider his claims. While most judicial challenges to a forfeiture are foreclosed by the plaintiff's failure to use the mechanism provided in the forfeiture statue and regulations, the federal courts have jurisdiction to entertain collateral due process attacks on administrative forfeitures, including challenges to the adequacy of notice. *United States v. Giraldo*, 45 F.3d 509, 511 (1st Cir. 1995) (per curiam); *Toure v. United States*, 24 F.3d 444, 445-46 (2d Cir. 1994) (per curiam); *United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1993). Although Dusenbery cannot pursue his claim in a Rule 41(e) motion because criminal proceedings against him have been completed, the district court should have construed his motion as a civil complaint seeking equitable relief. *Thompson v. Covington*, 47 F.3d 974, 975 (8th Cir. 1995) (per curiam); *Giraldo*, 45 F.3d at 511; *Toure*, 24 F.3d at 445.

Additionally, in order to assist the district court upon remand, we make several comments concerning the current state of the record. The record reveals that, in April 1986, the FBI conducted a search of Dusenbery's trailer in Atwater, Ohio and seized $21,940, a 1984 Chevrolet Monte Carlo, and a large number of Dusenbery's personal items. The government acknowledges that it subsequently forfeited this

property as proceeds of drug trafficking. Although Dusenbery argues that he was not aware of these forfeiture proceedings, the government submits that it provided Dusenbery with adequate notice of the forfeiture of his property.

Before the government forfeits property, due process requires that the government provide notice which is reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Giraldo,* 45 F.3d at 511. Further, if the government is incarcerating a property owner when it elects to pursue a forfeiture action against his property, fundamental fairness requires that the defendant receive actual notice of the agency's attempt to forfeit. *Id.*; *Woodall,* 12 F.3d at 794-45. The government cannot assert that it was unaware of a property owner's location when he is incarcerated in a federal facility. *See Torres v. $36,256.80 U.S. Currency,* 25 F.3d 1154, 1160-61 (2d Cir. 1994).

The evidence presently in the record does not appear to support the government's contention that Dusenbery had actual notice of his currency's forfeiture. The government provided evidence that, in November 1988, it sent notice of the forfeiture to three separate locations. One notice was mailed to Dusenbery's home in Atwater, Ohio; however, this certified mail was returned unclaimed. A second notice was mailed to Dusenbery at a residence in Randolph, Ohio; while this certified mail was signed for by an Edward Clouse, no evidence exists in the record concerning Clouse's relationship with Dusenbery or if Clouse ultimately provided this notice to Dusenbery. The third notice was sent to Dusenbery at the Federal Correctional Institution (FCI) in Milan, Michigan. While it is undisputed that Dusenbery was incarcerated at FCI Milan during this time, he notes that the certified mail gives an inaccurate P.O. Box for the facility. Further, the certified mail receipt contains an illegible signature. The government has not provided any additional evidence attempting to show

who signed for the letter or the standard procedure for processing such a letter once it arrived at the facility. Therefore, from the evidence in the record, it is not clear that: 1) the certified mail arrived at Milan, 2) a prison employee signed for it, or 3) the notice was ultimately forwarded to Dusenbery through the prison mail system. Lastly, the government did publish notice of the forfeiture in the *Cleveland Plain Dealer* on three separate occasions. However, as the government knew or should have known that Dusenbery was incarcerated at FCI Milan, it is not clear that publication in an Ohio newspaper was sufficient to provide Dusenbery with notice.

The evidence supporting the notice provided by the government for the forfeiture of Dusenbery's Monte Carlo appears even more attenuated. First, the government mailed notices to Dusenbery in Randolph, Ohio and Atwater, Ohio, although the record does not reflect that anyone received and signed for this certified mail. Second, the government mailed notice to Alma Dusenbery, but the record does not reflect her relationship to Dusenbery nor does it show that she actually received this notice. Third, the government sent notice to Dusenbery at the Portage County Jail in January 1987, but the record again does not contain any signature on certified mail demonstrating receipt of this notice. Further, Dusenbery submits that he was not located at the Portage County Jail during this time but was rather incarcerated at the FCI in Ashland, Kentucky. Lastly, the government again published notice of the forfeiture on three separate occasions in the *Cleveland Plain Dealer*, which appears insufficient to provide notice for a prisoner incarcerated in another state.

We also note that the government has not provided any evidence that it gave Dusenbery notice of the forfeiture of his personal property. Consequently, we remand this case to the district court so it can construe the matter as a civil action seeking equitable relief and determine whether the government provided Dusenbery with actual notice of the

various forfeitures.

Accordingly, this court vacates the district court's judgment and remands this case for further proceedings. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT
/s/ [Illegible]
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

IN THE MATTER OF THE PROPERTY FORFEITURE
OF LARRY DEAN DUSENBERY

State of Michigan)
County of Wastenaw)

DECLARATION OF JAMES LAWSON

COMES NOW, James Lawson, and declares

1. I am currently employed by the United States Government as an Inmate Systems Officer, assigned in the Mail Room at the Federal Correctional Institution, Milan, Michigan (F.C.I. Milan).

2. I received a copy of a certified mail receipt from the Legal Department at FCI Milan, and they received the copy from the United States Attorney's Office for the Northern District of Ohio. (See Exhibit "A").

3. I reviewed the certified mail receipt and can attest that the signature/initials on the form are my signature/initials.

4. The reason my signature appears on the form is based upon the procedure/practice used at FCI Milan for distribution of mail, specifically certified mail that has been forwarded to inmates housed at FCI Milan.

5. Specifically, FCI Milan Mail Room staff travel to the Post Office located in the City of Milan, Michigan everyday to obtain all mail for the institution, including inmate mail.

6. All certified mail requiring signature is signed for by the FCI Mail Room staff prior to departing the Post Office. This is why my signature appears on the receipt and not Mr. Dusenberry's signature.

7. Once the mail is transported to FCI Milan, all certified mail is entered into a log book maintained in the mailroom. Staff are then required to sign the log book acknowledging receipt of the certified piece of mail prior to removal from the Mail Room.

8. In the case of inmate mail, a member of the inmate's Unit Team will sign for the inmate's certified mail in the log book.

9. The Unit Team member or a correctional staff member will then distribute the mail to the inmates during the institution' s mail call.

10. Unfortunately, due to the fact that this event occurred in 1988, a inspection of old institutional log books indicates that log book no longer exists, and was most likely destroyed per BOP policy due to its age.

11. It should be noted that based upon the attached certified receipt, the letter was delivered to FCI Milan, and pursuant to the business practices of FCI Milan it should have been received by the inmate.

END OF STATEMENT

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing statements are true and correct.

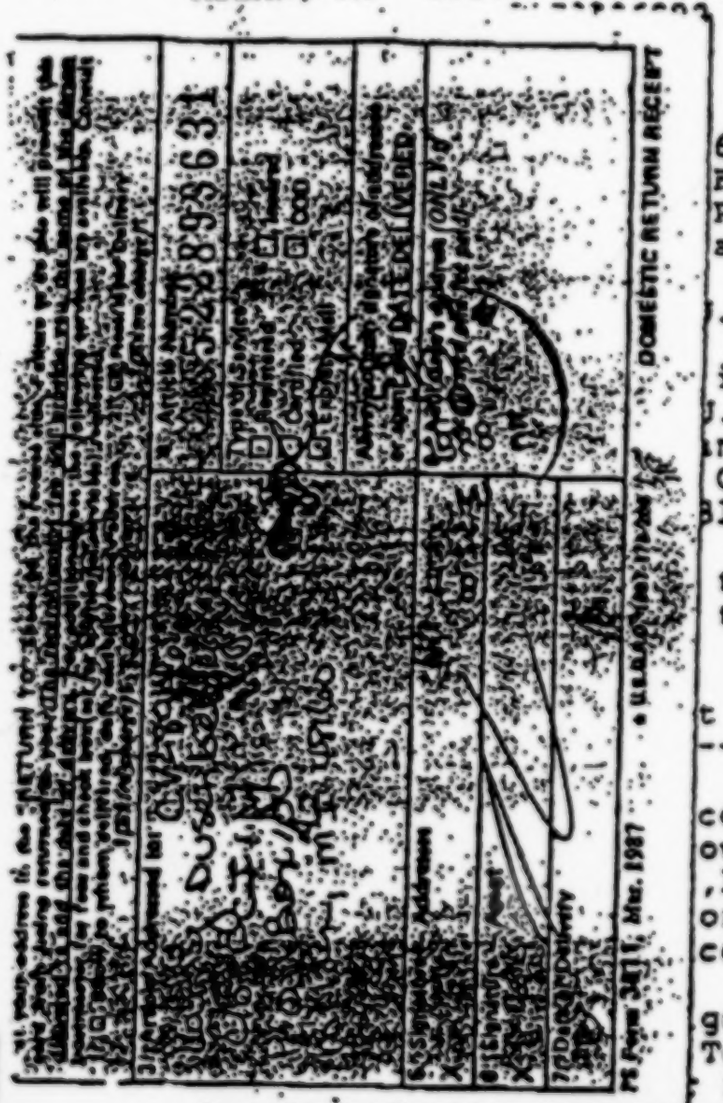
11-04-1996 /s/ James Lawson
Date Inmate Systems Officer
Federal Correctional Institution, Milan MI

SEIZURE NUMBER: 3170-89-F-0006

NOVEMBER 7, 1988

CERTIFIED RETURN RECEIPT

MR LARRY DUSENBERRY
C/O FCI
PO BOX 100
MILAN, MI 48160 RE: 3170-89-F-0006



6, property was seized by the Federal
FBI) at ATWATER, OHIO for forfeiture
ROLLED SUBSTANCES ACT. The property
and is described as follows:

.S. CURRENCY

is being conducted pursuant to Title
.S.C.), Section 881 and the following
nd regulations: 19 U.S.C., Sections
Code of Federal Regulations (C.F.R.),
81.

the seizure and forfeiture of this
to the FBI and request a pardon of the

t the Forfeiture

contest the seizure or forfeiture of
ou must file a claim of ownership and a
,193 with the FBI by DECEMBER 19, 1988.
or a cashier's check payable to the
ce or provide a surety.

gent (needy and poor), you may not
To request a waiver of the bond, you
finances in a signed statement called
"Declaration in Support of Request to Proceed in Forma Pauperis." You can obtain this form from the FBI Field Office listed below. File the signed declaration and a claim of ownership of the property with the FBI by DECEMBER 19, 1988.

To Request a Pardon of the Property

1 - CLEVELAND (Attn: Forfeiture Analyst)
1 - Mr. King
PVK:CXB (4)

00141

50908-060

PAGE.002

MAY 4 '95 13:29

EXHIBIT A 38

BEST AVAILABLE COPY

[Filed Feb. 28, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 5:95CV1872
(Criminal Case No. 5:86CR102)
Judge David D. Dowd, Jr.

UNITED STATES OF AMERICA,
Plaintiff,

v.

LARRY DEAN DUSENBERY,
Defendant.

PLAINTIFF' S RESPONSE
TO DEFENDANT'S
REQUESTS FOR ADMISSION

NOW COMES Plaintiff, the United States of America, and files this response to Defendant's Requests for Admission:

1) Do you admit that the forfeiture notification for the $21,940 was sent to P.O. Box 100 which is an incorrect address for the Federal Correctional Institution in Milan, Michigan 48160?

Answer: YES

2) Do you admit that the certified mail receipt for the forfeiture notification pertaining to the $21,940 contains an illegible signature?

Answer: NO

3) Do you admit that all certified mail that arrives at the Federal Correctional Institution in Milan, Michigan must be signed into a log book acknowledging receipt of the certified piece of mail?

Answer: YES.

4) If the answer to admission #3 is true, do you admit that you cannot produce this log book?

Answer: YES.

5) Do you admit that you cannot establish that the certified forfeiture notification pertaining to the $21,940, if it did arrive at FCI Milan, was ultimately forwarded to Larry Dusenbery through the prison mail system?

Answer: YES.

6) Do you admit that the 1984 Chevrolet Monte Carlo seized by the Federal Bureau of Investigation (FBI) was seized because the FBI claimed the car belonged to Larry Dusenbery?

Answer: NO.

7) Do you admit that Larry Dusenbery was incarcerated at the Federal Correctional Institution at Ashland, Kentucky in 1987?

Answer: YES.

8) Do you admit that the government sent forfeiture notification pertaining to the 1984 Chevrolet Monte Carlo to the Portage County Jail in 1987?

Answer: YES.

9) Do you admit that Larry Dusenbery was not at the Portage County Jail in 1987 because he was incarcerated at the Federal Correctional Institution at Ashland, Kentucky?

Answer: YES.

10) Do you admit that the government did not send Larry Dusenbery any forfeiture notifications pertaining to his personal property listed in his 41 (e) motion?

Answer: YES.

STATE OF OHIO)
) ss:
COUNTY OF CUYAHOGA)

VERIFICATION

The responses to numbers 1, 2, 6, 7, 8, 9 and 10 of Defendant's Requests for Admission are true and accurate to the best of my information, knowledge and belief.

/s/ Steven W. Pyles
Steven W. Pyles
Paralegal Specialist
Federal Bureau of Investigation

Sworn to and subscribed in my presence this 12th day of February, 1997.

/s/ Theresa M. Bozak
Notary Public

THERESA M. BOZAK
Notary Public, State of Ohio
Recorded in Cuyahoga, Cty.
My Comm. Expires 8/17/98

STATE OF MICHIGAN)
) ss:
COUNTY OF WASTENAW)

VERIFICATION

The responses to numbers 3, 4, and 5 of Defendant's Requests for Admission are true and accurate to the best of my information, knowledge and belief.

/s/ Kevin Walasinski
Kevin Walasinski
Attorney-Advisor
Federal Correctional Institution,
Milan, Michigan

Sworn to and subscribed in my presence this 19th day of February, 1997.

/s/ Velda M. Bell
Notary Public
NOTARY PUBLIC
WASHTENAW CO., MICH
My Commission expires
[ILLEGIBLE]

CERTIFICATION

Pursuant to Rule 26(g)(2), Federal Rules of Civil Procedure, undersigned counsel hereby certifies the foregoing responses and objections.

/s/ Herbert J. Villa
Herbert J. Villa
Assistant U.S. Attorney

[CERTIFICATE OF SERVICE]

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 95-CV-1872
Crim. No. 5:86 CR 102
Honorable David D. Dowd, Jr.

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

LARRY DEAN DUSENBERY
Defendant.

AFFIDAVIT OF
LARRY DEAN DUSENBERY

STATE OF INDIANA) ss,
COUNTY OF VIGO)

Larry Dean Dusenbery, being first duly sworn, deposes and states as follows:

1) I am the Defendant in Civil No. 95 CV 1872 and Crim. No. 5:86 CR 102.

2) On April 23, 1986 the Federal Bureau of Investigation (FBI) searched my residence in Atwater, Ohio and seized $21,940, a 1984 Chevrolet Monte Carlo, and a large number of my personal items.

3) I was the true owner of the $21,940, the personal property, and the 1984 Monte Carlo.

4) I bought the Monte Carlo from Mike Groff and placed the title in my stepmother's name, Alma Dusenbery.

5) I did not receive any forfeiture notifications for any of the items seized.

6) I was not advised by anyone that forfeiture proceedings were being initiated against any of the items seized.

7) I was incarcerated at the Federal Correctional Institution (FCI) in Ashland, Kentucky from September, 1986 until April, 1988 when I was moved to FCI Milan, Michigan.

8) That because I was incarcerated out of the State of Ohio I did not see any newspaper publications pertaining to the forfeiture of my property in the Ohio newspapers.

9) That the mailing address for FCI Milan, Michigan is Post Office Box 1000 and not Post Office Box 100.

FURTHER DEPONENT SAYETH NOT.

I declare under penalty of perjury that the above is true and correct to the best of my knowledge, information and belief, pursuant to 28 U.S.C. section 1746.

Dated: Feb. 14, 1997.

/s/ Larry Dean Dusenbery
Larry Dean Dusenbery

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:95CV1872
86CR0102
Akron, Ohio

LARRY DEAN DUSENBERY,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Telephone Deposition of
JAMES CURTIS LAWSON
Wednesday, July 23, 1997, 10:30 a.m.
Before the Honorable David D. Dowd, Judge

APPEARANCES:

For the Plaintiff: Larry Dean Dusenberry

For the Defendant: Herbert J. Villa
James L. Morford
Assistant United States Attorneys
1880 Bank One Center
600 Superior Avenue, East
Cleveland, Ohio 44114

Court Reporter: Caroline Mahnke
Federal Building & U.S. Courthouse
125 Market Street
Youngstown, Ohio 44503

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

THE COURT: We are calling you today for the purpose of taking a deposition in the case of Dusenberry versus United States, 5:95CV1872.

The deposition is to be of James Lawson. Is he present?

VOICE: Yes, sir, and he is present. Let me put you on speaker phone. Do I have you, your Honor?

THE COURT: Yes.

Let me go on further with the record. Mr. Lawson?

MR. LAWSON: Yes.

THE COURT: This is Judge Dowd and I am going to preside over your deposition to be taken by Larry Dean Dusenberry, and I would ask now that you take the oath.

JAMES CURTIS LAWSON,

a witness called by the Plaintiff, being first duly sworn, was examined and testified as follows:

THE COURT: Very well. Now, present in the room is, of course, Mr. Dusenberry, a court reporter, Mr. Villa, Mr. Morford, my law clerk, several people from the marshal's office and of course Mr. Dusenberry.

Mr. Dusenberry, you made proceed now with your questions.

EXAMINATION OF JAMES CURTIS LAWSON

BY MR. DUSENBERPY:

Q. For the record, please state your full name and spell your last name.

A. James Curtis Lawson, last name spelling L-A-W-S-O-N.

Q. And what is your occupation?

A. I am employed at FCI Milan. My position is an Inmate Systems Officer.

Q. How long have you been employed in that capacity?
A. Approximately ten years.
Q. When did you begin to work in the mail room at FCI Milan?
A. I believe that was in early '88.
Q. You do not know the date?
A. I do not know specifically when I began working in the mail room, no, sir.
Q. Did you work in the mail room in November of 1988?
A. Yes, sir, I did.
Q. Have you consulted with any government officials such as Gregory Sasse or any other United States attorney, FBI agent, etcetera pertaining to today's deposition?
A. I've consulted with our staff attorney, Mr. Walasinski.
Q. And what did you discuss?
A. We simply covered my earlier statement, reviewed it.
Q. Did any government official prepare you for today's disposition?

THE COURT: It's deposition.

BY MR. DUSENBERRY:

Q. Deposition?
A. No, sir.
Q. Were you coached by any government official as to what you are to say in today's deposition?
A. No, sir, I was not.
Q. Have you had any disciplinary reports, remands, reprimands, etcetera, since you have been employed by the Bureau of Prisons?

MR. VILLA: Your Honor, I would object to that.

THE COURT: Objection sustained.

BY MR. DUSENBERRY:

Q. Have you ever been arrested?

MR. VILLA: Your Honor, I would object to that.

THE COURT: Sustained.

You can ask if he's ever been convicted of a felony.

BY MR. DUSENBERRY:

Q. Have you ever been convicted of a felony?
A. No, sir, I have not.
Q. Do you hold any bad feelings or prejudice against me for any reasons relating to my incarceration at FCI Milan?
A. No, sir, I do not.
Q. Have you ever been involved in any investigations pertaining to me?
A. Not to my knowledge, no.
Q. Have I ever sued you?
A. Not that I know of.
Q. Do you hold any prejudice against me for suing any of your fellow employees?
A. No, sir, I do not.
Q. Do you have any other relatives working within the Bureau of Prisons?
A. No, I do not.
Q. You have sworn out an affidavit pertaining to a certified mail receipt that relates to this case, correct?
A. Yes, I have.
Q. In your affidavit, you allege that you received a copy of the certified mail receipt from the legal department, FCI Milan, and that they received the copy from the U.S. attorney's office for the Northern District of Ohio; correct?
A. Yes, sir, that is correct.
Q. Now, this certified mail was allegedly sent November 1988, correct?
A. Yes.
Q. You claim in your affidavit that you—after you received the certified mail receipt from the legal department which was originally sent in November 1988, eight years ago, that you can identify the signature on that receipt, correct?
A. Yes, I can identify that as being my own.

Q. And you claim the signature on the receipt is yours?
A. That is correct.
Q. You are a hundred percent sure?
A. Yes, I am.
Q. Is it true that the receipt contains an illegible signature?
A. I can identify it as my own. I can't determine whether or not someone else would classify it as being illegible.
Q. Is it a signature or is it initials?
A. It is initials, sir.
Q. If an ordinary person was to look at the signature, could they identify the signature?
A. I doubt that.
Q. Is there any way possible that the signature could be someone else's?
A. Yes, there is that possibility.
Q. Has anyone requested you to say that it's your signature?
A. No, sir.
Q. Do you admit that the certified mail receipt has an incorrect post office box number and is not the post office box number for FCI Milan?
A. Sir, on the copy that I have of that receipt, I cannot determine that. It's somewhat blurred.
Q. What is the post office box that was on the certified mail receipt? What is the post office box for Milan, Michigan?
A. We have two post office boxes that we use for the institution. One is 9999, the other one is 1000.
Q. Are you aware that the certified mail receipt had P.O. Box 100 on it?
A. Sir, I'm looking at a photocopy and I really can't determine that.
Q. Is it a letter, the photocopy, is it on the front of a letter?
A. One moment. Yes, it is.

Q. What does it say at the top?
A. P.O. Box 100.
Q. Thank you.
So, you say that the signature could possibly be somebody else's; is that correct?
A. I guess there is that possibility; but looking at it, I can identify that as either being my signature or one very similar to it.
Q. Do you admit that all certified mail that arrives at FCI Milan must be signed in a log book and acknowledge receipt of the certified piece of mail?
A. That is correct.
Q. Can you produce this log book?
A. No, sir, I cannot.
Q. If you cannot produce the log book, do you admit that you cannot prove that whatever was attached to the certified mail receipt was ultimately forwarded to Larry Dusenberry through the prison mail system?
A. No, sir, I cannot prove that.
Q. In other words, after you signed for the mail and brought it to the mail room at FCI Milan, if it is your signature, you do not know what happened to the mail after that, correct?
A. Due to the fact that there is no longer a log book because we dispose of those one year after closing, there is no longer a paper trail that would allow us to trace that back, sir.
Q. My question to you is: Do you know what happened to the mail after it came to FCI Milan?
A. Procedure would be that I would log it in, sir, identifying your name, the registered number, or I should say the certification number, and it would be signed for by your unit team and then given to yourself.
Q. But because you do not have the log book, you do not know what happened to the mail; is that correct?
A. That is a correct statement, sir.

Q. Do the counselors in each inmate's housing unit also have a log book in which they have the inmate sign for the certified mail before the mail is given to the inmate, a separate log book than the log book in the mail room?

A. Sir, I do not know if that is policy because it is not something that would be pertinent to my department. That would be case workers' responsibility.

Q. Can you find that out for me?

A. Sure, I would be happy to look into that.

Q.The Bureau of Prisons does not keep these log books in an archive for later purposes such as this one?

A.No, they don't. Those are held for one year after they're closed and then they are disposed of. That is per BOP policy.

MR. DUSENBERRY: That's all I have.

THE COURT: Anything further?

EXAMINATION OF JAMES CURTIS LAWSON

BY MR. VILLA:

Q. Mr. Lawson, this is Herbert Villa, of the U.S. attorney's office.

A. Yes.

Q. I would like to get back to the issue that it's possible that the signature could be somebody else's.

If you look at that signature, of course somebody could duplicate it, perhaps, but to the best of your knowledge, to the best of your vision, is that your signature on that card?

A. Yes, sir, it is.

MR. VILLA: I don't have any further questions.

THE COURT: Anything further?

EXAMINATION OF JAMES CURTIS LAWSON

BY MR. DUSENBERRY:

Q. But you do admit that it's possible that signature could be someone else's?

A. I think that would be speculation. Anything is possible, but I can't identify that as being my signature.

Q. But you are not a hundred percent sure?

A. Well, I can state that that is identical to my signature, sir.

Q. But you're not sure—you are not a hundred percent sure if it is your signature?

A. I can honestly say that is my signature, but like I said before, you know, if you want to take it into the realm of what could be, yes, it could be a forgery.

Q. It could be somebody else's signature?

A. That is possible.

MR. VILLA: Thank you.

THE COURT: I believe that concludes the deposition. Thank you very much.

Kindly, I will direct the court reporter to transcribe the deposition and then the clerks office to mail a copy to Mr. Dusenberry, and I will accept further briefing on the convening motions for summary judgment.

I would ask that each of you file your supplemental brief no later than four weeks from now which we'll set the date as—well, let's make it August 22. Maybe it will be a little more than four weeks. And then I will consider the matter submitted. Thank you very much for everybody's cooperation, especially in Milan. Thanks.

MR. LAWSON: Thank you, your Honor.

THE COURT: This deposition here is over.

MR. LAWSON: Thank you very much. Good-bye.

THE COURT: Good-bye.

MR. VILLA: Your Honor, off the record for a minute.

(Deposition concluded 10:50a.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Caroline Mahnke 7-25-97
Caroline Mahnke, RMR Date

[Filed Jan. 19, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 5:95-CV- 1872
5:86-CR- 102
Judge James S. Gwin

UNITED STATES OF AMERICA.
Plaintiff.

v.

LARRY DEAN DUSENBERY.
Defendant.

OPINION AND ORDER

On March 26, 1997, Defendant Larry Dean Dusenbery filed a motion for summary judgment in this forfeiture case. [Doc. 138]. On March 28, 1997, Plaintiff United States filed a motion for summary judgment. [Doc. 139]. Both parties supplemented their motions with later briefs. [Doc. 152, 154, 173, 174, and 175].

In this opinion, the Court must determine whether a genuine issue of material fact exists regarding whether the government provided proper notice to Defendant Dusenbery when forfeiting cash proceeds from drug sales. The Court finds that Plaintiff United States provided proper notice.

The Court must also determine whether Plaintiff Dusenbery has a right to compensation for personal property that was destroyed upon his conviction or for which he had improper notice of forfeiture. The Court finds that Defendant Dusenbery is not entitled to compensation for the personal property.

Accordingly, the Court grants Plaintiff United States' motion for summary judgment and denies Defendant Dusenbery's motion for summary judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

On April 29. 1986, Defendant Dusenbery was arrested on drug and possession of firearm charges. During a search of Dusenbery's property at the time of the arrest, law enforcement agents seized approximately $21,940 in cash, a 1984 Chevrolet Monte Carlo automobile, and miscellaneous personal property.

After Defendant Dusenberys conviction,[1] the government, with the assent of the U.S. Attorney's Office. abandoned or destroyed Dusenbery's personal property as evidence. No official forfeiture proceeding was initiated. Dusenbery's right to compensation for this property is at issue.

The government initiated administrative forfeiture proceedings pursuant to 21 U.S.C. § 881(a)(6) with regard to the cash and the automobile as proceeds of drug sales. Defendant Dusenbery did not file a bond to stop the administrative proceedings as required by C.F.R. § 1316.76 and the forfeiture proceeded. Dusenbery claims he did not do so because he never received notice of the forfeiture proceedings.

In 1993, Plaintiff Dusenbery filed a Rule 41(e) motion requesting the return of the seized property. United States District Judge David D. Dowd denied Dusenbery's motion for lack of jurisdiction.[2] On September 25, 1996, the United States Court of Appeals for the Sixth Circuit vacated the

[1] Dusenbery pled guilty to the drug charge and was sentenced on July 15. 1986.

[2] A complete history of the procedure of this case is set forth in District Judge Dowd's opinion of October 5, 1995 [Doc. 115].

judgment and remanded the case.[3] The Sixth Circuit directed that the district court "construe the matter as a civil action seeking equitable relief and determine whether the government provided Dusenbery with actual notice of the various forfeitures."[4]

Subsequent to the Sixth Circuit opinion, both parties in this case filed motions for summary judgment.

On May 29. 1997, District Court Judge Dowd ordered an evidentiary hearing to determine the value of the personal property and the validity of a prison employee's declaration that notice of the cash's forfeiture was received at the prison where Defendant Dusenbery was incarcerated. At the hearing, the Court presided over a telephone deposition of James Lawson, an Inmate Systems Officer and the Federal Correctional Institution in Milan. Michigan, where Defendant Dusenbery was incarcerated at the time the alleged notice regarding the cash was delivered.

At the hearing, District Court Judge Dowd determined that the personal property should have been returned upon Dusenbery's conviction. Because no forfeiture proceeding was initiated regarding the personal property and the property had been destroyed, Judge Dowd found that Defendant Dusenbery was entitled to the value of the personal property at the time it was seized and not returned. Judge Dowd reduced the value of the property by twenty-five percent because the property was not new at the time of the seizure.

Also at the hearing, Defendant Dusenbery admitted he purchased items of personal property and the 1984 Monte Carlo with proceeds from drugs sales. District Court Judge Dowd directed the parties to brief the issue whether Defendant Dusenbery was entitled to the value of personal property and the vehicle bought with drug money.

[3] Doc. 121.

[4] *Id.*

On September 15, 1997, before rendering a decision on the issues in this case, District Court Judge Dowd granted Defendant Dusenbery's request for recusal.[5] The case was ultimately reassigned to District Court Judge James S. Gwin, who determines the pending issues herein.

II. STANDARD OF REVIEW

Fed. R. Civ. P. 56 (c) states the procedure for granting summary judgment and says in pertinent part:

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In considering a motion for summary judgment, the court must view the facts and all inferences to be drawn therefrom in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970); *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987); *SEC v. Blavin*, 760 F.2d 706, 710 (6th Cir. 1985). The moving party has the burden of showing conclusively that no genuine issue of material fact exists. *60 Ivy Street Corp.*, 822 F.2d at 1435.

Essentially factual disputes about matters essential to adjudication preclude the Court from granting summary judgment. *See id.* But not every factual dispute between the parties will prevent summary judgment. Rather, the disputed facts must be material. They must be facts which, under the substantive law governing the issue, might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

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[5] Doc. 160.

The factual dispute must also be genuine. The facts must be such that if they were proven at trial a reasonable jury could return a verdict for the non-moving party. *Id.* at 248. The disputed issue does not have to be resolved conclusively in favor of the non-moving party, but that party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. *60 Ivy Street*, 822 F.2d at 1435 (citing *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968)); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Thus, the judge's function at the point of summary judgment is limited to determining whether sufficient evidence has been presented to make the issue a proper jury question, and not to judge the evidence and make findings of fact. "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *60 Ivy Street*, 822 F.2d at 1436 (quoting *Anderson*, 477 U.S. at 249).

Both Plaintiff United States and Defendant Dusenbery move for summary judgment. The Court addresses the relevant issues in turn.

III. ANALYSIS

A. $21,939 in Cash

Defendant Dusenbery claims he never received proper notice that forfeiture proceedings regarding the seized cash had been instituted. The Court disagrees and grants Plaintiff United States' motion for summary judgment and denies Defendant Dusenbery's motion on this issue.

The government admits that the address on the notice was incorrect: instead of reading P.O. Box 1000, the notice was

addressed to P.O. Box 100 in Milan. Michigan. The certified mail receipt contained an arguably illegible signature. In its opinion directing District Court Judge Dowd to evaluate the notice in this case, the Sixth Circuit pointed out that the government had not, as of that date, produced sufficient evidence that a prison employee signed for the forfeiture notice or the standard procedure for processing such notice once it arrived at the prison.

Since the Sixth Circuit's opinion, the government has offered the affidavit of James Lawson, an Inmate Systems Officer at the Milan Facility. Mr. Lawson attested that he signed the certified mail receipt and described the process for forwarding prison mail to the inmates.[6] Mr. Lawson's deposition testimony is consistent with his affidavit.

Defendant Dusenbery counters Mr. Lawson's testimony one two grounds. First. Dusenbery argues that even if the Court accepts that notice arrived at the Milan facility, the government cannot show that notice was forwarded to him. Second, Dusenbery points out that Mr. Lawson admitted he could not be "100%" certain that the signature on the receipt was his; that is, there is a "possibility" that the signature was forged or was signed by the owner of P.O. Box 100 instead of P.O. Box 1000. The Court is not persuaded by Defendant Dusenbery's arguments.

First, the Sixth Circuit does not require the government to show the mail actually reached an inmate in order to satisfy requirements of due process. In *United States v. Real Property, Tree Top, et al.*, 129 F.3d 1266 (TABLE), 1997

[6] Mr. Lawson states that as a Mail Room employee at the Milan facility, he reviewed and signed the certified mail receipt. All certified mail is entered into a log book before the mail leaves the Mail Room. A staff member assigned to the inmate signs for the inmate's mail and delivers it to the inmate. Mr. Lawson states that the log hook no longer exists. According to prison policy, the log books are disposed of after one year.

WL 702771 (6th Cir. 1997), the Sixth Circuit addressed a contention of inadequate notice posed by an inmate at the Milan facility. The Sixth Circuit found that proof of certified mail sent to an inmate's place of residence satisfied the inmates due process rights. *Id.* at *2.

The government in this case has provided persuasive evidence that a prison mail room employee. Mr. Lawson, signed the certified mail receipt. This notice was reasonably calculated to notify Defendant Dusenbery of the forfeiture action. Under *Tree Top*, it is not the government's burden to show, as Defendant Dusenbery argues, that he actually received the notice.[7]

[7] Defendant Dusenbery argues this Court cannot rely on *Tree Top*, an unpublished opinion, for its decision here. Dusenbery's correct that Sixth Circuit Rule 24(c) states citation of unpublished opinions is disfavored except for establishing res judicata. estoppel. or the law of the case.

However, the rule also states:

> If counsel believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such decision may be cited if counsel serves a copy thereof on all other parties in the case and on the court. Such service may be accomplished by including a copy of the decision in an addendum to the brief.

The government included a copy of *Tree Top* in its supplemental pleading, Doc. 174. It is undisputed that Defendant Dusenbery received a copy of the opinion, as he references it in has supplemental pleading, Doc. 175.

The sufficiency of notice is a material issue in this case and no other published opinion of the Sixth Circuit falls as squarely on the facts of this case as *Tree Top*. The *Tree Top* opinion is also significant because it was decided after the Sixth Circuit's opinion remanding this case to the district court for determination as to the sufficiency of notice and is the most recent reflection of Sixth Circuit law on point. Therefore, Defendant Dusenbery's argument that this Court should not rely on *Tree Top* is of no moment.

Dusenbery's assertion that there is a possibility of forgery is similarly unconvincing. Even viewing Dusenbery's argument in a light most favorable to him, the Court cannot recognize a mere possibility of forgery as sufficient evidence to survive a summary judgment motion.

Accordingly, the Court grants the government's motion and denies Defendant Dusenbery's motion with regard to the $21,940 in cash.

B. 1984 Monte Carlo and Miscellaneous Personal Property

Defendant Dusenbery argues that the government's notice of forfeiture regarding the Monte Carlo was insufficient to notify him of the proceeding. Dusenbery also claims violation of his due process rights when the government destroyed miscellaneous items of personal property after his conviction. Dusenbery makes no allegations of illegal seizure of the car or items of personal property. The government concedes Dusenbery has standing to bring claims about the car despite the fact that Dusenbery's stepmother is the titled owner.[8]

At the hearing to determine the value of the personal property, Defendant Dusenbery admitted that the car and personal property were purchased with drug proceeds. District Court Judge Dowd directed the parties to brief the Court about whether Dusenbery's admission disqualifies him from having his vehicle returned to him for lack of proper notice or from being compensated for the personal property's destruction without a forfeiture proceeding.

In other words, this Court is not presented with the issue of sufficiency of notice regarding forfeiture of the Monte Carlo or violation of Dusenbery's due process rights upon the destruction of his personal property.[9] Instead, this Court must

[8] Doc. 149.

[9] The Court notes that there appears to be no issue of notice to resolve. In its opinion confirming the district court's jurisdiction over the case, the Sixth Circuit directed the Court to determine the propriety of the

determine whether Defendant Dusenbery is entitled to compensation. The Court finds he is not.

The Court notes first that although Judge Dowd identified three items of personal property as being purchased with drug proceeds, Defendant Dusenbery's testimony at the hearing indicates that all items of personal property were purchased with drug proceeds:

Q: Was any of this [personal] property purchased on credit cards?
A: No, sir.
Q: Was it purchased by cash?
A: Yes.
Q: And where did the cash come from?
A: It came from me.
Q: Were you employed?
A: No.
Q: Where did the cash come from then?
A: From selling drugs.

* * * *

The Court: You indicated . . . that the source of the money for at least one of the purchases is drug money. Is it your position that all these items were bought with drug money?

government's notice regarding forfeiture of the $21,939 in cash and the Monte Carlo. This Court has already determined that notice regarding the cash was sufficient. *See* Part III.A, *supra*.

With regard to forfeiture of the Monte Carlo, the Sixth Circuit noted the attenuated nature of the evidence of notice. *See* Doc. 121, at 4. Since the Sixth Circuit's opinion, this Court can find no record of the government's offering evidence to support the legitimacy of notice of forfeiture of the Monte Carlo. Further, the evidentiary hearing transcript indicates Dusenbery was entitled to compensation, prior to his admission that the car and personal property were purchased with drug proceeds. Therefore, this Court addresses only the effect of Dusenbery's admission on his right to compensation.

Mr. Dusenbery: Yes, your honor.

Evidentiary Hearing Transcript, Doc. 147, at 11-12, 15.

With regard to the Monte Carlo, the Court found it was purchased with drug proceeds:

The Court: How did you acquire that automobile?

Mr. Dusenbery: That automobile was purchased from Michael Groff in 1985. I paid him in cash.

The Court: How much did you pay for it?

Mr. Dusenbery: I paid $8,000 for the car.

The Court: What was the source of the cash?

Mr. Dusenbery: I believe I paid some of the money and—no I believe I paid it all. And it was probably proceeds.

The Court: From drug proceeds?

Mr. Dusenbery: From cocaine sales.

The Court: All right. Well, well take that . . . the defendant concedes it was purchased by drug proceeds.

Evidentiary Hearing Transcript. Doc. 147, at 22.

Defendant Dusenbery's admission about drug proceeds, combined with his testimony that he had been unemployed since 1983—two years before any of the items or the car at issue was purchased—lead this Court to find that all items of personal property and the car were purchased with drug proceeds. Therefore, the Court's disposition on the issue of compensation applies equally to all the personal property and the Monte Carlo.

Defendant Dusenbery argues he is entitled to compensation for the violation of his rights. The Court is not persuaded.

Acquisition of property through drug proceeds affects a claimant's right to that property in forfeiture actions. In the Sixth Circuit, "one never acquires a property right to [drug] proceeds, which include not only cash but also property

secured with the proceeds of illegal activity." *United States v. Salinas*, 65 F.3d 551, 553 (6th Cir. 1995). As another court explained, someone who purchases property with drug proceeds "has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity." *United States v. Tilley*, 18 F.3d 295, 300 (5th Cir. 1994). The Sixth Circuit specifically pointed to *Tilley* for support in the *Salinas* opinion.

Although proper notice was not at issue in either *Salinas* or *Tilley*, the general principle in those cases remains. Defendant Dusenbery has no property rights in the Monte Carlo or the personal property. To order compensation for destruction of this property or improper notice of forfeiture would allow Dusenbery to retain the fruits of illegal activities, his involvement in which is undisputed.

In short, Defendant Dusenbery concedes he purchased the property with drug proceeds. He does not challenge the legality of the seizure of this property. In light of these concessions, this Court can find no genuine issue of material fact which survives for trial.

Further, in light of the illegal source of the Monte Carlo and personal property, it would be against public policy to allow Dusenbery to retain property which he obtained as a result of illegal activity.

Accordingly, the Court declines to exercise its equitable powers to compensate Defendant Dusenbery regarding the Monte Carlo and the personal property.

IV. CONCLUSION

For the reasons described herein, the Court grants Plaintiff United States' motion for summary judgment and denies Defendant Dusenbery's motion for summary judgment.

IT IS SO ORDERED.

Date: January 15, 1999 /s/ James S. Gwin
Hon. James S. Gwin
U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-3148

UNITED STATES OF AMERICA,
Plaintiff-Applellee,

v.

LARRY DEAN DUSENBERY,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Ohio at Akron.
No. 95-01872—James S. Gwin, District Judge.

Submitted: June 15, 2000
Decided and Filed: July 10, 2000*

Before: MARTIN, Chief Judge; WELLFORD and BATCHELDER, Circuit Judges.

COUNSEL

ON BRIEF: Larry Dean Dusenbery, Terre Haute, Indiana, *pro se*. Herbert J. Villa, ASSISTANT U.S. ATTORNEY, Cleveland, Ohio, for Appellee.

OPINION

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* This decision was originally issued as an "unpublished decision" filed on July 10, 2000. On August 1, 2000, the court designated the opinion as one recommended for full-text publication.

PER CURIAM. Larry Dean Dusenbery appeals a district court judgment granting summary judgment for the government in this administrative forfeiture proceeding initiated pursuant to 21 U.S.C. § 881(a)(6). This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

On April 29, 1986, Dusenbery was arrested on drug and possession of firearm charges. During a search of Dusenbery's property at the time of the arrest, law enforcement agents seized approximately $21,940 in cash, a 1984 Chevrolet Monte Carlo automobile, and miscellaneous personal property. Dusenbery's claim for compensation for this property is now at issue.

Dusenbery initially filed a Fed. R. Crim. P. 41(e) motion requesting the return of the seized property, which motion was denied. Upon appeal, this court vacated the district court's judgment and remanded the case. *See Dusenbery v. United States*, No. 95-4188, 1996 WL 549818 (6th Cir. Sept. 25, 1996) (unpublished order). We directed that the district court "construe the matter as a civil action seeking equitable relief and determine whether the government provided Dusenbery with actual notice of the various forfeitures." *Id.* at *3

The district court then presided over a telephone deposition of James Lawson, an Inmate Systems Officers at the Federal Correctional Institution in Milan, Michigan, where Dusenbery was incarcerated at the time the alleged notice regarding the cash was delivered in connection with this controversy.

The district court determined that the personal property should have been returned upon Dusenbery's conviction, but some personal items had been destroyed and no forfeiture proceeding had been initiated. In addition, the district court

found that Dusenbery was entitled to the value of the personal property at the time it was seized. More significant, however, at that hearing *Dusenbery admitted that he purchased the items of personal property and the 1984 Monte Carlo with proceeds from drug sales*. The district court then directed the parties to brief the issue whether Dusenbery was entitled to the value of personal property and the vehicle admittedly bought with drug money.

After the case was reassigned to another district judge, the court determined that the notice received at the Milan prison facility was reasonably calculated to notify Dusenbery of the forfeiture action, and that since Dusenbery admitted that he purchased the 1984 Monte Carlo and miscellaneous personal property with drug proceeds, he had *no property rights* in these items. Summary judgment was accordingly granted to the government, and this timely appeal followed.

This court reviews a judgment granting summary judgment de novo and uses the same standards as used by the district court. *See EEOC v. Prevo's Family Mkt., Inc.*, 135 F.3d 1089, 1093 (6th Cir. 1998); *Peoples Bank & Trust Co. of Madison County v. Aetna Cas. & Sur. Co.*, 113 F.3d 629, 633 (6th Cir. 1997). Summary judgment is appropriate where "there is no genuine issue as to any material fact and [ ] the moving party is entitled to a judgment as a matter of law." *See* Fed. R. Civ. P. 56(c); *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993). The party opposing a motion for summary judgment "may not rest upon the mere allegations or denial of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (quoting former Fed. R. Civ. P. 56(e)). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff" *Id.* at 252.

We conclude first that summary judgment for the government was proper regarding the $21,929 in cash. The government has provided persuasive evidence that a prison mail room employee signed the certified mail receipt. The government has offered the affidavit of James Lawson, an Inmate Systems Officer at the Milan Facility. Lawson attested that he signed the certified mail receipt and described the process for forwarding prison mail to the inmates. Lawson's deposition testimony is consistent with his affidavit.

Notwithstanding Dusenbery's contention that he did not receive actual notice, this notice was "reasonably calculated, under all the circumstances, to apprise [him] of the pendency of the action and afford [him] an opportunity to present [his] objections." *Mullane*, 339 U.S. at 314. As the district court correctly stated, citing *United States v. Real Property, Tree Top*, No. 96-3757, 1997 WL 702771, at *2 (6th Cir. Oct. 31, 1997) (unpublished opinion), this court does not require the government to show that the mail actually reached an inmate in order to satisfy requirements of due process. Because adequate notice was given, Dusenbery is not entitled to relief on this claim. The *Tree Top* decision was decided after this court's opinion remanding this case to the district court for determination as to the sufficiency of notice and is the most recent reflection of Sixth Circuit law on point.

At the hearing to determine the value of the personal property, Dusenbery admitted that the car and personal property were purchased with drug proceeds. Thus, the sufficiency of notice regarding forfeiture of the Monte Carlo or violation of Dusenbery's due process rights upon the destruction of his personal property are not the issues presented in this case. Instead, the issue is simply whether Dusenbery is entitled to compensation under that admitted circumstance.

Acquisition of property through drug proceeds affects a claimant's right to that property in forfeiture actions. In this

circuit, "one never acquires a property right to [drug] proceeds, which include not only cash but also property secured with the proceeds of illegal activity." *United States v. Salinas*, 65 F.3d 551, 553 (6th Cir. 1995). *See also United States v. Tilley*, 18 F.3d 295, 300 (5th Cir. 1994) (Someone who purchases property with drug proceeds "has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity.").

Dusenbery's admission about drug proceeds, combined with his testimony that he had been unemployed since 1983—two years before any of the items or the car at issue was purchased—leads to the conclusion that the personal property and the car, involved were purchased with drug proceeds. Dusenbery had no property rights, therefore, in the Monte Carlo or the personal property. To order compensation for destruction of this property or improper notice of forfeiture would allow Dusenberyto retain the fruits of illegal activities, his involvement in which is undisputed. Further, as pointed out by the district court, in light of the illegal source of the Monte Carlo and personal property, it would be against public policy to allow Dusenbery to retain property which he obtained as a result of illegal activity. Accordingly, summary judgment for the government was proper regarding all personal property, including cash and the automobile.

Accordingly, the district court's judgment is AFFIRMED.

May 14, 2001

(6)

Supreme Court, U.S.
FILED
MAY 14 2001
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No. 00-6567

IN THE

Supreme Court of the United States

LARRY DEAN DUSENBERY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

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May 2001

38 pp

QUESTION PRESENTED

Whether the federal government violated the Due Process Clause of the Fifth Amendment by failing to give actual notice to an inmate in its own prison system before it forfeited the inmate's property for its own benefit.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 8

ARGUMENT 11

A. The Balance Of Factors Weighs Decidedly In Favor Of Actual Notice. 12

B. Because The Forfeiture Was Effected Without Due Process, It Is Void 26

CONCLUSION 29

TABLE OF AUTHORITIES

CASES — Pages

Barrera-Montenegro v. United States,
74 F.3d 657 (5th Cir. 1996) 26

Boero v. DEA,
111 F.3d 301 (2d Cir. 1997) 15, 26

Cafeteria & Restaurant Workers Union v. McElroy,
367 U.S. 886 (1961) 13, 24

Carey v. Piphus,
435 U.S. 247 (1978) 22

Clymore v. United States,
164 F.3d 569 (10th Cir. 1999) 26

Covey v. Town of Somers,
351 U.S. 141 (1956) 24

Degen v. United States,
517 U.S. 820 (1996) 8

Green v. Lindsey,
456 U.S. 444 (1982) 8, 11

Harmelin v. Michigan,
501 U.S. 957 (1991) 22

Hess v. Pawloski,
274 U.S. 352 (1927) 24

Houston v. Lack,
487 U.S. 266 (1988) 14

Lopez v. United States,
201 F.3d 478 (D.C. Cir. 1999) 15

Mathews v. Eldridge,
424 U.S. 319 (1976) 9, 12, 13, 22

McDonald v. Mabee,
243 U.S. 90 (1917) 26

McVeigh v. United States,
78 U.S. (11 Wall.) 259 (1871) 8

Mennonite Board of Missions v. Adams,
462 U.S. 791 (1983) 8, 23, 24, 25

Muhammed v. DEA,
92 F.3d 648 (8th Cir. 1996) 26

Mullane v. Central Hanover Bank,
339 U.S. 306 (1950) ..... *passim*

In re One 1985 Nissan, 300ZX,
889 F.2d 1317 (4th Cir. 1989) 13

Peralta v. Heights Medical Center,
485 U.S. 80 (1988) 26

Robinson v. Hanrahan,
409 U.S. 38 (1972) 14

Small v. United States,
136 F.3d 1334 (D.C. Cir. 1998) 14, 16, 26

Torres v. $36,256.80 U.S. Currency,
25 F.3d 1154 (2d Cir. 1994) 15

Tulsa Prof'l Collection Services v. Pope,
485 U.S. 478 (1988) 12

United States v. Brockamp,
519 U.S. 347 (1997) 28

United States v. Campbell,
No. 99-2336, 2001 U.S. App. LEXIS 1912
(6th Cir. Feb. 2, 2001) 14

United States v. Clark,
84 F.3d 378 (10th Cir. 1996) 14, 23

United States v. Dusenbery,
201 F.3d 763 (6th Cir.),
cert. denied, 121 S. Ct. 301 (2000) 15, 26

United States v. Five Thousand Dollars,
184 F.3d 958 (8th Cir. 1999) 14, 15

United States v. Giovanelli,
998 F.2d 116 (2d Cir. 1993) 27

United States v. Giraldo,
45 F.3d 509 (1st Cir. 1995) 26

United States v. James Daniel Good Real Property,
510 U.S. 43 (1993) 21, 22

United States v. Kubrick,
444 U.S. 111 (1979) 27

United States v. Marolf,
173 F.3d 1213 (9th Cir. 1999) 26

United States v. Minor,
228 F.3d 352 (4th Cir. 2000) 13, 14, 15

United States v. One 1936 Model Ford Coach,
307 U.S. 219 (1939) 26

United States v. One Toshiba Television,
213 F.3d 147 (3d Cir. 2000) 14, 16, 17, 19, 26

United States v. Poe,
No. 99-5089, 2000 U.S. App. LEXIS 1905
(6th Cir. Feb. 7, 2000) 14

United States v. Real Property,
135 F.3d 1312 (9th Cir. 1998) 14

United States v. 2751 Peyton Woods Trail,
66 F.3d 1164 (11th Cir. 1995) 26

United States v. Ursery,
518 U.S. 267 (1996) 21

United States v. Woodall,
12 F.3d 791 (8th Cir. 1993) 4

Walker v. City of Hutchinson,
352 U.S. 112 (1956) 11

Weng v. United States,
137 F.3d 709 (2d Cir. 1998) 14, 16, 17, 18

Whiting v. United States,
231 F.3d 70 (1st Cir. 2000) 14, 19, 23

STATUTES

19 U.S.C. § 1607 ..... 2, 3, 17

19 U.S.C. § 1608 3

19 U.S.C. § 1609 3

19 U.S.C. § 1610 2

19 U.S.C. § 1621 ..... 2, 27, 28

21 U.S.C. § 881(a)(6) 2

21 U.S.C. § 881(d) 2

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2074(a) 18

Civil Asset Forfeiture Reform Act of 2000,
Pub. L. No. 106-185, 114 Stat. 202 (2000)
(codified at 18 U.S.C. § 983) 28, 29

RULES AND REGULATIONS

Federal Rule of Civil Procedure 4(d) 18

Federal Rule of Civil Procedure 4(e) 18

21 C.F.R. § 1316.75(a) 2

21 C.F.R. § 1316.75(b) 3

21 C.F.R. § 1316.76(b) 3

21 C.F.R. § 1316.78 3

28 C.F.R. § 540.19(a) 17

MISCELLANEOUS

BOP Program Statement § 5800.10 (Nov. 3, 1995),
available at http://www.bop.gov 6, 20

128 Cong. Rec. H 9848 (daily ed. Dec. 15, 1982)
(statement of Congressman Edwards),
reprinted in 1982 U.S.C.C.A.N. 4434 18

Federal Rule of Civil Procedure 4(d),
advisory committee note to 1993 amendment 18

National Archives and Records Administration,
General Records Schedule 12,
Communications Records (Transmittal
No. 8 Dec. 1998), *available at*
http://ardor.nara.gov/grs/grs12.html 20

USPS Domestic Mail Manual (Apr. 5, 2001),
available at http://pe.usps.gov 18

4 C. Wright & A. Miller, *Federal Practice & Procedure*
(2d ed. Supp. 2000) 27

OPINIONS BELOW

The opinion of the court of appeals is reported at 223 F.3d 422 (6th Cir. 2000), and is reproduced in the Joint Appendix ("JA") at 67. The order of the district court is reported at 34 F. Supp. 2d 602 (N.D. Ohio 1999), and is reproduced at JA 55. A prior unreported court of appeals opinion is noted at 97 F.3d 1451 (Table) and is reproduced at JA 31.

JURISDICTION

The court of appeals entered judgment in this case on July 10, 2000. Petitioner filed a timely petition for rehearing or rehearing en banc, which the court of appeals denied on August 25, 2000. The petition for a writ of certiorari was filed on October 16, 2000, and the Court granted the writ on February 26, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

On April 23, 1986, petitioner Larry Dean Dusenbery was arrested at his home by the FBI. JA 1, 56. On July 15, 1986, he pled guilty to a drug charge and was sentenced to twelve years in prison and a six-year term of parole. JA 1-2. While in prison, Petitioner was convicted of another offense; and, therefore, he has remained in prison continuously since 1986. *See United States v. Dusenbery*, 89 F.3d 836 (Table) (6th Cir. 1996).

During a search of Petitioner's home on the day of his 1986 arrest, the FBI seized $21,939 in cash, a 1984 Chevrolet Monte Carlo, and numerous items of personal property, including a coat, a bracelet, a wallet, a briefcase, cellular telephones, and answering machines. JA 32; R 140 at 3.[1] After Petitioner's conviction, the Government abandoned or destroyed the personal items. The Government did not attempt to provide notice to Petitioner before doing so. JA 56.

Some time later, the Government began the process for administrative forfeiture of the other seized property pursuant to 21 U.S.C. § 881. Section 881(a)(6) provides for the civil forfeiture of property "furnished or intended to be furnished in exchange for a controlled substance . . . [and] all proceeds traceable to such an exchange . . . ." Seizure of such property is to be accomplished through the application of the customs laws, 19 U.S.C. §§ 1600-1609. 21 U.S.C. § 881(d). The customs laws provide for the administrative forfeiture of property worth $500,000 or less, without judicial involvement. 19 U.S.C. § 1607.[2] To effect the forfeiture, the Government must initiate proceedings within five years of discovery of the offense that forms the basis of the forfeiture. *Id.* § 1621. The Government initiates proceedings by publishing a notice of intent to forfeit the property once each week for three successive weeks "in a newspaper of general circulation in the judicial district in which the processing for forfeiture is brought," 21 C.F.R. § 1316.75(a); 19 U.S.C. § 1607(a), and

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[1] Citations to the district court record are referenced by "R" followed by a docket number.

[2] For items of property valued at more than $500,000, the Government must use judicial forfeiture proceedings. 19 U.S.C. § 1610.

sending a written notice to anyone "who appears to have an interest in" the property. *Id.* Anyone claiming an interest in the property has twenty days after the first publication to file a claim and a cost bond. *Id.* § 1608; 21 C.F.R. § 1316.75(b). That filing stops the administrative process and requires the Government to commence a judicial forfeiture proceeding. 19 U.S.C. § 1608; *see* 21 C.F.R. §§ 1316.76(b), 1316.78. If no claim is filed, the property is deemed forfeited and title vests in the United States. 19 U.S.C. § 1609.

In January 1987, when the FBI began the process to forfeit the Monte Carlo automobile, Petitioner was incarcerated at a federal prison in Kentucky. The Government sent notices of the forfeiture by certified mail to Petitioner at two private addresses in Ohio, sent another to him care of the Portage County Jail in Ohio, and sent a notice to Alma Dusenbery, his stepmother. JA 34. The record does not reflect whether anyone signed for any of that certified mail. *Id.* The Government also published notice of the forfeiture in an Ohio newspaper, the Cleveland Plain Dealer. *Id.* When no one submitted a claim to contest the forfeiture—as Petitioner could not, having no knowledge of the proceeding—the car was forfeited. JA 32.

In November 1988, the Government began a separate proceeding to forfeit the cash. At that time, Petitioner was incarcerated in the Federal Correctional Institute at Milan, Michigan (FCI Milan). The Government published notice of the forfeiture of the cash in the Cleveland Plain Dealer. JA 34. The Government also sent notice by certified mail addressed to Petitioner to two private addresses in Ohio and to FCI Milan. The first notice was returned unclaimed; the second was signed for by Edward Clouse, but there is no evidence of Mr. Clouse's relationship to Petitioner or that Mr. Clouse forwarded the notice to Petitioner. The third notice was signed for by an

employee of the FCI Milan mailroom. JA 33. There is no evidence of what happened to the notice after it reached the prison mailroom, JA 33-34; JA 36-37, 40; and neither the Government nor the courts below challenged Petitioner's statement that he did not receive the notice. When Petitioner did not follow the procedures for contesting the forfeiture—as he could not, having no knowledge of the proceeding—the money was forfeited. JA 32.

On November 12, 1993, Petitioner filed a motion for return of property pursuant to Federal Rule of Criminal Procedure 41(e). R 74. He filed the motion in the Northern District of Ohio under the docket number of the 1986 criminal proceeding against him. Petitioner's motion asked for return of his property on the ground that the government had neither returned it nor instituted forfeiture proceedings. *Id.* The government responded that it had either forfeited or destroyed all of the property seized from Petitioner. R 85, 92.

After briefing by both parties, the district court denied the motion for return of property. R 115; JA 55. The court held that it lacked jurisdiction because Petitioner had not contested the forfeiture in the manner set forth in the forfeiture statute and regulations. R 115 at 9-10; *see* JA 31.

The Sixth Circuit reversed. Citing cases from three other circuit courts, the court explained that federal courts have jurisdiction to hear "collateral due process attacks" on administrative forfeitures. JA 32. *See also United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1993) ("federal courts have universally upheld jurisdiction to review whether an administrative forfeiture satisfied statutory and due process requirements"). Because Petitioner was raising a due process challenge to the adequacy of notice, the district court had jurisdiction. The Sixth Circuit further explained that

Petitioner's challenge could not proceed as a Rule 41(e) motion because the criminal proceedings against him had been completed and that the district court should have construed the motion as a civil complaint seeking equitable relief. JA 32.

The court went on to note certain flaws in the Government's evidentiary showing that Petitioner had adequate notice. JA 32-34. The court observed that, although notice of the forfeiture of the cash had been mailed to FCI Milan, where Petitioner was incarcerated, the certified mail receipt stated an inaccurate post office box (box 100 rather than box 1000), the signature on the receipt was illegible, and the Government had offered no evidence of the standard procedure for processing such letters at FCI Milan. JA 33-34. The court therefore could not conclude that the notice had arrived at the prison or that it had been forwarded to Petitioner through the prison mail system. As to the automobile, the court observed that the "evidence supporting the notice provided by the government for the forfeiture . . . appears even more attenuated," as the Government had not attempted to provide notice to Petitioner at the federal prison where he was housed at the relevant time. JA 34. And as to the personal property, the court "note[d] that the government has not provided any evidence that it gave [Petitioner] notice of the forfeiture." JA 34.

On remand, Petitioner took discovery, and both parties moved for summary judgment. R 138, 139. The Government submitted a declaration from James Lawson, an employee at the FCI Milan mailroom, who stated that the signature on the certified mail receipt was his. JA 36. He explained the prison's procedures for handling certified mail as follows: Mailroom staff travel to the post office to collect all mail sent to the prison, including inmate mail. A staff member signs for certified mail at the post office, then takes the mail back to the prison, where certified mail is entered into a mailroom log

book. A staff member from the inmates' Unit Team then signs the book, indicating receipt of the mail by that staff member, before taking the mail from the mailroom. The Unit Team staff member or other correctional staff then distributes the mail during the institution's mail call. JA 36-37. The Lawson Declaration also stated that log books are kept for only one year after they are closed and that the log book for the date relevant here no longer existed. JA 10. *See also* BOP Program Statement § 5800.10.409 (Nov. 3, 1995), *available at* http://www.bop.gov, described *infra* at 20. Thus, the most the Government could say was that, since the letter was received by mailroom staff, "it should have been" delivered to Petitioner. JA 37.

Petitioner's summary judgment motion challenged the adequacy of notice as to all three categories of property. As to the personal items, he relied on the fact that the Government had not attempted to provide any notice but had simply disposed of the property after Petitioner's sentencing. As to the automobile, Petitioner argued that notice was inadequate because the Government sent it to the Portage County Jail, when it knew that he was incarcerated in the federal prison at Ashland, Kentucky. As to the cash, Petitioner pointed out that the Government had addressed the certified mail to the wrong post office box, that it offered no proof that the notice sent to FCI Milan had been forwarded to him through the prison mail system, and that it knew that he was represented by counsel in the criminal proceedings but did not send notice of the forfeiture to his lawyer. R 138 at 7-8.

On July 23, 1997, the district court held an evidentiary hearing to determine the value of seventeen items of personal property that the government had destroyed without notice and without instituting forfeiture proceedings. R 147 at 2-3. During the hearing, the court recognized the inadequacy of the

notice as to the automobile and the miscellaneous personal items. *Id.* at 19, 21. Petitioner testified as to where he purchased the personal items and how much he had paid for them. In response to the court's questioning, he admitted that he had bought two items of personal property and probably the car with drug proceeds. *Id.* at 15-16, 20, 22. The court then asked for further briefing on the issue of whether Petitioner was entitled to compensation for those items and one other item that the court thought might have been bought with drug proceeds. *Id.* at 20, 22.

Soon thereafter, a new judge was assigned to the case and issued a final opinion and order. JA 55. First, the court held that the notice sent by certified mail to Petitioner at the prison where he was incarcerated was reasonably calculated to notify him of the forfeiture proceeding regarding the $21,939 in cash. JA 59-61. Second, the court held that Petitioner was not entitled to compensation for any of the personal property or for the Monte Carlo automobile because, although notice was inadequate, Petitioner had conceded that he purchased the property with drug proceeds. JA 65.[3]

The Sixth Circuit affirmed. The court held that the procedure for giving notice of the forfeiture of the cash—sending certified mail to the prison where the mailroom had a process for forwarding mail to inmates—was "reasonably calculated, under all the circumstances, to apprise [Petitioner] of the pendency of the action and afford [him] an opportunity to present [his] objections." JA 70 (citation omitted). The court held that due process did not require the Government to

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[3] In fact, Mr. Dusenbery had admitted to buying two items of personal property and possibly the car with drug proceeds, but none of the other items. *See* R 147 at 15-16, 20.

show that the mail actually reached Petitioner. *Id.* Turning to the automobile and the personal items, the court held that Petitioner had no property rights to any of that property because "one never acquires a property right to [drug] proceeds." JA 71.

This Court granted the petition for a writ of certiorari solely to consider the adequacy of the notice of forfeiture of the $21,939.

SUMMARY OF ARGUMENT

Individuals have a right, secured by the Due Process Clause, to a hearing to contest the forfeiture of their property. *Degen v. United States*, 517 U.S. 820, 822 (1996); *McVeigh v. United States*, 78 U.S. (11 Wall.) 259, 266-67 (1871). "This right has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950); *Green v. Lindsey*, 456 U.S. 444, 449 (1982). For this reason, due process generally requires actual notice to interested parties prior to forfeiture. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 796-97 (1983).

Personal service is the only guarantee of actual notice, yet some situations present practical obstacles to such service. In recognition of this fact, this Court has held that the provision of notice is subject to the "limits of practicability." *Mullane*, 339 U.S. at 318. Although a rigid rule prescribing the means of providing notice is not possible, "in any proceeding which is to be accorded finality," notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314.

Mullane calls for a realistic appraisal of the adequacy of notice based on the circumstances presented in the individual case. *Mathews v. Eldridge*, 424 U.S. 319 (1976), supplies a useful structure for making that appraisal. Under the test stated in *Mathews*, the adequacy of procedures used to deprive an individual of life, liberty, or property is assessed by weighing three factors: the private interest at stake, the risk of erroneous deprivation associated with those procedures and the probable value of additional or different procedures, and the government's interest, including any burden that different procedures would impose.

Applied to the facts here, the *Mathews* test weighs decidedly in favor of requiring actual notice. The private interest at stake here is $21,939, but the same notice procedures are used with regard to property valued at as much as $500,000. The risk of erroneous deprivation is high. Published notice and notice sent to inmates' home addresses are empty gestures. And notice sent in care of a prison all too frequently results in non-delivery, as illustrated by the large number of reported cases in which inmates have challenged forfeitures for lack of notice. The probable value of additional or different procedures is also high, since the Government is in control of an inmate's whereabouts and is in a position to secure the cooperation of prison officials in ensuring actual notice.

Moreover, the burden on the Government of providing actual notice is minimal. The Government already uses three forms of inadequate notice—newspaper, certified mail to home address(es), and certified mail sent in care of the prison—any or all of which it could readily replace with efforts to secure delivery of notice directly to the inmate. In addition, the Government already maintains a detailed paper record of its attempts to provide notice. As a result, keeping a record demonstrating actual notice would not add to the Government's

paperwork burden. Furthermore, the Government's interest in forfeiting property used to facilitate or traceable to drug crimes is not threatened by a rule requiring actual notice; for the property at issue must be assumed to be legitimately owned until forfeiture proceedings are completed, especially items, such as cash or a coat found in a home, with no inherent connection to a drug transaction. To minimize due process protections out of respect for the Government's interest in forfeiting contraband or illegally acquired property would be equivalent to presuming that one is guilty until proved innocent. Such an approach would be particularly troubling here, where the Government stands to gain financially from forfeiture, and thus from inadequate notice.

Not only do the *Mathews* factors, taken together, cry out for more reliable notice in the circumstances presented here, but not one of the factors suggests otherwise. Although mail is often a reliable proxy for personal service—that is, a reliable means of providing actual notice—mail is not a reliable means of providing actual notice when the addressee is in prison. The Government's proxies for actual notice were constitutionally inadequate, and the forfeiture therefore violated due process.

Accordingly, the forfeiture of the money seized from Petitioner's home should be declared void. And because the Government allowed the statute of limitations for initiating forfeiture proceedings to pass without providing actual notice to Petitioner, it must return his property to him.

ARGUMENT

The Government took the property of Petitioner Dusenbery without providing actual notice, and it does not contest that fact. The question here is whether the substitutes for actual notice were sufficient to satisfy due process in the circumstances presented. This Court's due process jurisprudence provides the answer: Actual notice is required before the Government may forfeit property of a federal inmate.

"Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing *appropriate to the nature of the case*." *Mullane*, 339 U.S. at 313 (emphasis added). In *Mullane* and numerous cases thereafter, this Court, rather than setting up a rigid formula to dictate the means of providing notice, has emphasized that the sufficiency of notice varies with the circumstances. *Id.* at 315; *see Green v. Lindsey*, 456 U.S. at 451; *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956). In each case, "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315.

Three factual circumstances dictate the outcome here. First, Petitioner was in a federal prison, and the Government knew exactly where. Second, the Government's ability to provide actual notice is better under the facts of this case than under virtually any other set of facts, since it alone controlled Petitioner's physical location. Third, the Government gained financially from *not* providing actual notice.

A. The Balance Of Factors Weighs Decidedly In Favor Of Actual Notice.

1. To identify the requirements of due process in a given situation, the Court balances the "interest of the State" and the "individual interest sought to be protected by the [Fifth] Amendment." *Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478, 484 (1988) (quoting *Mullane*, 339 U.S. at 314). The Court has articulated the test as follows:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. at 335.

Applied here, the *Mathews* balancing test, which essentially restates *Mullane*'s concern that notice be appropriate to the nature of the case, 339 U.S. at 313, demonstrates that the notice in this case failed to satisfy the constitutional standard. First, the private interest affected is $21,939—a significant sum for most individuals. The Government uses the same procedures used here for forfeitures of inmates' property valued at up to $500,000. *See* 19 U.S.C. § 1607. In addition, the Government may initiate separate administrative forfeiture proceedings for each piece of property seized from an

individual, which can raise the total value of the loss above $500,000. *See In re One 1985 Nissan, 300ZX*, 889 F.2d 1317, 1322 (4th Cir. 1989). For example, in Petitioner's case, the Government forfeited his car in a separate proceeding from his money. Although the combined value of these assets did not exceed $500,000, the Government's decision to initiate separate proceedings to forfeit different items of property seized at one time illustrates that $500,000 is not necessarily the maximum private loss at stake.

Second, the risk of erroneous deprivation and the probable value of additional procedures are both high. The "risk of erroneous deprivation" prong looks to the "fairness and reliability" of the existing procedures, *Mathews*, 424 U.S. at 343, such as whether the form of notice is likely to reach the intended individuals or whether hearing procedures are likely to provide a full and fair airing of the significant facts. The factual background of a case—that Petitioner had been convicted of drug charges, for instance—is not a proper consideration under this prong. *See id.* at 343-46 (second prong analyzed in terms of safeguards against mistake); *see also Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 894 (1961) ("This question cannot be answered by an easy assertion that, because she had no constitutional right to be there in the first place, she was not deprived of liberty or property by the Superintendent's action.").

The likelihood that notice published in a newspaper will reach an inmate in federal prison is negligible. Indeed, whether the notice is published in the local newspaper for the area where the seizure occurred, as in this case (where the publication appeared in Cleveland, Ohio, while the Petitioner was in a Michigan prison), or whether it is published in a national newspaper, *see, e.g.*, *United States v. Minor*, 228 F.3d 352, 354 (4th Cir. 2000) (publication in USA Today), this form

of notice to an inmate epitomizes notice that is a "mere gesture." *Id.* at 358-59 (quoting *Mullane*, 339 U.S. at 315).

The likelihood that an inmate will receive mail sent to his or her "home" address is only marginally better, since, as the Government knows for a certainty, the inmate is not at that address. Accordingly, this Court has recognized that notice mailed to an inmate's home address simply is not "'reasonably calculated' to apprise [the inmate] of the pendency of the forfeiture proceedings." *Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972) (citation omitted).

The likelihood that an inmate will receive notice sent in care of the prison where he or she is housed is certainly higher. Nonetheless, "this method of giving notice is suspect . . . [because], as a prisoner, the owner is unable to insure that he will receive the notice once the post office has delivered it to the institution. The owner is entirely dependant on the institution to deliver his mail to him." *Weng v. United States*, 137 F.3d 709, 715 (2d Cir. 1998); *cf. Houston v. Lack*, 487 U.S. 266 (1988) (notice of appeal by pro se prisoner deemed filed when delivered to prison authorities for mailing because of prisoner's lack of control over mail procedures). The significant risk that notice mailed to a jail or prison will not reach the inmate is evidenced by the many cases raising post-forfeiture challenges for lack of notice. *See, e.g., United States v. Campbell*, No. 99-2336, 2001 U.S. App. LEXIS 1912 (6th Cir. Feb. 2, 2001); *Whiting v. United States*, 231 F.3d 70 (1st Cir. 2000); *United States v. One Toshiba Television*, 213 F.3d 147 (3d Cir. 2000); *United States v. Poe*, No. 99-5089, 2000 U.S. App. Lexis 1905 (6th Cir. Feb. 7, 2000); *United States v. Five Thousand Dollars*, 184 F.3d 958 (8th Cir. 1999); *Weng*, 137 F.3d 709; *Small v. United States*, 136 F.3d 1334 (D.C. Cir. 1998); *United States v. Real Property*, 135 F.3d 1312 (9th Cir. 1998); *United States v. Clark*, 84 F.3d 378 (10th Cir. 1996); *see*

also, e.g., Minor, 228 F.3d 352 (notice sent to wrong facility); *United States v. Dusenbery*, 201 F.3d 763 (6th Cir.), *cert. denied*, 121 S. Ct. 301 (2000) (same); *Lopez v. United States*, 201 F.3d 478 (D.C. Cir. 1999) (same); *Boero v. DEA*, 111 F.3d 301 (2d Cir. 1997) (same); *Torres v. $36,256.80 U.S. Currency*, 25 F.3d 1154 (2d Cir. 1994) (same).

Neither the Government nor the courts below disputed that Petitioner had not received the notice sent to him at FCI Milan. Nonetheless, the courts held that he had not been deprived of due process because the procedures in place at the prison were reasonably calculated to provide notice. JA 61, 70. However, although the Government, through the testimony of one mailroom employee, introduced evidence of the procedures in place at the prison for handling certified mail, JA 36, it offered nothing to show that the procedures were followed or effective in this case, or in general. *Cf. Five Thousand Dollars*, 184 F.3d at 960 (court unable to determine whether inmate received actual notice because prison's policy of documenting delivery to inmate by signing log book not followed). Instead, the Government admitted that it could not establish delivery of the notice to Petitioner. JA 40.[4]

In other words, the lower courts held that the procedures were constitutionally adequate based on their intuition about fairness, notwithstanding the absence of *any* evidence to show that the procedures worked in reality—that is, evidence that the procedures used did not carry an undue risk that a forfeiture

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[4] The Government could not produce the log book to show that the employee who signed for the mail at issue had logged it in, JA 40; it did not offer evidence that a staff member from Petitioner's unit had picked up that mail; it did not produce a staff member who recalled delivering that mail to Petitioner.

notice sent to the prison would not be delivered to the inmate for whom it was intended. The courts' conclusion that the procedures in place at FCI Milan were reasonable was made on the basis of a vague and abstract evidentiary record. The reality, as demonstrated by this case and numerous others, is that the risk of non-delivery is high when mail—certified or not—is sent to an inmate in care of a prison. *Cf. Mullane*, 339 U.S. at 320 ("Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.") (citation omitted).

Whereas the procedures that the Government uses to convey notice to inmates are not "reasonably certain to inform those affected," *id.* at 315, the probable value of additional procedures is high. Petitioner was incarcerated at a location chosen by the Government and could move only as the Government chose.

> [B]ecause the owner's jailor—the Bureau of Prisons—is part of the same government, and in many cases part of the same department of government, as the agency seeking to give notice, the forfeiting agent can in all probability easily secure the Bureau's cooperation in assuring that the notice will be delivered to the owner and that a reliable record of the delivery will be created.

Weng, 137 F.3d at 715; *see also Small*, 136 F.3d at 1338 ("The government can easily call the prison or the Bureau of Prisons, and find out . . . whether some problem at the prison prevented delivery."). In other words, when the government seeks to deliver a notice to an inmate, it knows where to find him or her and can be equally sure that he or she will be there when the papers are delivered. *One Toshiba Televison*, 213 F.3d at 154.

The Government can also verify delivery. *See* 28 C.F.R. § 540.19(a) (prison may request inmate to sign for receipt of legal mail).

Because the Government can control an inmate's whereabouts—both the prison in which an inmate is housed and the inmate's location within the prison at a given time—if the Government chose to ensure that an inmate actually received notice, it could easily do so. Indeed, "[w]hen an individual is incarcerated at a location of the government's choosing, the government's ability to find and directly serve him or her with papers is at or near its zenith." *One Toshiba Television,* 213 F.3d at 154. For example, in this case, the part of the Department of Justice that carried out the forfeiture (FBI) could obtain the cooperation of the part of the Department of Justice that was holding Petitioner (Bureau of Prisons) in assuring delivery of a notice and in obtaining a signed receipt from the inmate.

In contrast, under the procedure followed here for serving notice of forfeiture on prison inmates, the relevant form is not signed by the addressee but by a prison employee. The certified mail receipt "does not furnish reliable assurance of delivery to the owner [because] the receipt is to be signed not by the person but by the institution." *Weng*, 137 F.3d at 715 n.6. To correct this procedural defect, the Government could, for example, send the notice to a prison official, with a request that a prison employee watch the prisoner open the notice, co-sign a receipt, and mail the signed paper back to the agency from which it came. If the Government did not receive the signed notice back in a timely fashion, a telephone call to the prison warden could expedite the process. Such steps, in comparison to the current procedures, would be far more effective and efficient in terms of ensuring that the notice was delivered to the inmate, not just to a mailroom employee.

It bears mention that certified mail is no more likely to reach its destination than other mail. *See* USPS Domestic Mail Manual S912.1.1 (Apr. 5, 2001), *available at* http://pe.usps.gov. Its only advantage is that, in the usual case, the signed receipt provides proof that the goal of *actual* notice has been achieved. The signature of the interested party is critical to the adequacy of the mailed notice. Thus, for example, although Federal Rule of Civil Procedure 4(d) allows a plaintiff to serve a complaint by mail, that means of informing a defendant of the initiation of a lawsuit is called "waiver of service." This phrase was chosen by the Rules Committee to emphasize that service cannot be effected by mail "without the affirmative cooperation of the defendant." *See* Fed. R. Civ. P. 4(d), advisory committee's note to 1993 amendment. Service by mail, or waiver of service, calls for the *defendant* to sign a form acknowledging receipt and agreeing to waive formal service. If the defendant does not sign and return the form, the plaintiff must effect service by other means. Fed. R. Civ. P. 4(d), (e). Significantly, in 1982, the Rules Committee considered allowing service by certified mail, return receipt requested; but Congress, acting pursuant to 28 U.S.C. § 2074(a), rejected that form of notice out of concern that "registered and certified mail were not necessarily effective methods of providing actual notice to defendants of claims against them." 128 Cong. Rec. H 9848 (daily ed. Dec. 15, 1982) (statement of Rep. Edwards), *reprinted in* 1982 U.S.C.C.A.N. 4434, 4439.

Third, and for similar reasons, the burden on the Government of requiring actual notice is not significant. When the owner of the property is a federal inmate, the Government has the knowledge and the means to effect actual notice. *See also Weng*, 137 F.3d at 715 ("When such an investigating agency wishes to secure such a prisoner's cooperation in testifying against some important wrongdoer, it has no

difficulty delivering the message in a manner that insures receipt."). The Government already mails a notice to the facility where the inmate is housed. Given the Government's position of power, and the relationship between the agency pursuing the forfeiture and the Bureau of Prisons (both parts of the same executive branch and often, as in this case, the same agency), the additional step of providing actual notice would not be onerous.

Significantly, the case law does not question the feasibility of providing more reliable notice. *See, e.g., Whiting*, 231 F.2d at 76 (actual notice not required although "proof of actual delivery would give better assurance and is arguably quite feasible"). For example, the Third Circuit, sitting en banc, recognized that "[t]he relative burdens and benefits of additional steps to ensure actual notice . . . suggest that requiring greater efforts at assuring notice by the government is appropriate." *One Toshiba Television*, 213 F.3d at 154. That court nonetheless refused to require actual notice out of concern about "the evidentiary burden that [an actual notice] standard could impose after the passage of time." *Id.* Yet to ask the Government to retain a receipt signed by the inmate as proof of actual notice would not place an inappropriate evidentiary burden on the Government. This case and others show that the Government retains a remarkably complete record of the notice it provides—requests for and copies of newspaper publications, receipts indicating certified mail was sent, return receipts when obtained, and evidence that mail was returned unopened. *See* JA 13-30. Given the record that the Government already maintains, retaining a signed receipt from the inmate would not impose an additional burden. To the contrary, providing actual notice would save the Government the resources expended on the numerous post-forfeiture legal challenges by inmates who never received notice that their property rights were in jeopardy. *See, e.g.*, cases cited *supra* pages 14-15.

The Bureau of Prisons' Mail Management Manual provides that, although mailroom staff must sign the certified mail receipt:

> "[a] log shall be maintained which the inmate shall be required to sign prior to delivery, thus completing the chain of receipts. At institutions which elect to have unit staff sign for all receipt mail (certified, etc.), unit staff shall have the inmate sign a receipt log prior to delivering the receipt-type mail.

BOP Program Statement § 5800.10.409 (Nov. 3, 1995), *available at* http://www.bop.gov. Taking advantage of these Bureau of Prisons procedures, the Government, if it attempts to provide notice by certified mail, could without burden (1) retain in the forfeiture file a copy of the page of the prison mail log signed by the prisoner, (2) ask that the prisoner sign a receipt at the same time he or she signed the log book, for retention in the forfeiture file, or (3) retain the log book. *But see* National Archives and Records Administration, General Records Schedule 12, Communications Records (Transmittal No. 8 Dec. 1998), *available at* http://ardor.nara.gov/grs/grs12.html (agencies must destroy postal service records after one year). Whether the Government chose one of these or another method of proving actual delivery of the notice, the Bureau of Prisons' Mail Management Manual illustrates that obtaining an inmate's signature for receipt of mail is feasible and even expected by the Bureau of Prisons.

If the Government were "desirous of actually informing" federal inmates of the forfeiture proceedings, *Mullane*, 339 U.S. at 315, it could substitute for its current procedures the procedures suggested above, or similar procedures designed to ensure that the notice reached the inmate. The trade off—dropping the current mailings in favor

of procedures calculated to assure that the inmate received the notice—would increase the "probable value of the procedural safeguards" with little if any additional administrative burden on the Government.

The Government's interest in civil forfeiture cases such as this one is "primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct." *United States v. Ursery*, 518 U.S. 267, 284 (1996). Civil forfeiture ensures that individuals do not profit from their illegal acts and serves the purpose of deterrence. *Id.* at 291, 292. Although these interests are important ones, the Government has no legitimate interest in using the forfeiture law to take property that was not used in connection with and was not the proceeds of a crime. It should go without saying that even individuals convicted of crimes have a right to retain property unrelated to the crime and that not all property in the possession of a criminal will be traceable to criminal activity. Accordingly, providing inmates with actual notice of forfeiture proceedings does not threaten the Government's legitimate interest in forfeiting the proceeds of illegal activity. It merely increases the chances that the Government will have to prove its case. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 62 (1993) ("Fair procedures are not confined to the innocent. The question before us is the legality of the seizure, not the strength of the Government's case.").

This case also presents another type of government interest. Unlike in *Mullane*, where the state of New York created the notice rules but did not stand to benefit from ineffective notice, 339 U.S. at 308-09, in this case the Government is not a disinterested party. Here, any property not claimed will be taken by the Government. Because "the Government has a direct pecuniary interest in the outcome," due process protection is of "particular importance here."

James Daniel Good Real Property, 510 U.S. at 55-56; *cf. Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit."). Where the Government has a pecuniary interest in the effectiveness (or ineffectiveness) of notice, any assertion of burden should be closely scrutinized.

Finally, the third *Mathews* prong considers the public interest. *Mathews*, 424 U.S. at 347. Because procedural due process protections minimize "substantively unfair or mistaken deprivations of property," *James Daniel Good Real Property*, 510 U.S. at 53 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972)), the public interest in due process is extremely high. Reflecting its value to society, "the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions . . . ." *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

Weighing the three *Mathews* factors—the private interest, the risk of error and the probable value of additional or different procedures, and the Government's interest—the balance is lopsidedly in favor of better procedures for providing notice of forfeitures to federal inmates. Indeed, all of the factors weigh on the same side of the scale. Although the Government's current practice involves several forms of notice—newspaper notice, notice mailed to the inmate's home, and notice sent to the prison—none is well-tailored, under the circumstances, to inform inmates that they have twenty days to take action or lose all rights to their property.

2. *Mullane* ties the adequacy of notice to the circumstances presented in the individual case. It holds that due process allows substitutes for personal service where such service imposes significant burdens and makes clear that a serious effort to inform interested parties is always required.

339 U.S. at 315, 318. Some lower courts have strayed from *Mullane*'s message, however, by misconstruing the Court's holdings in *Mullane* and *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), as stating a rule that mailed notice is per se adequate notice. *See, e.g., Clark,* 84 F.3d at 381; *see also Whiting*, 231 F.3d at 77 (mail provides adequate notice unless government knew delivery in particular prison was unreliable). In fact, time and again, including in *Mullane* and *Mennonite Board of Missions*, this Court has instructed the lower courts to take just the opposite approach.

In *Mullane*, the property at issue consisted of a large number of small interests in a trust. The bank-trustee did not have addresses for all of the beneficiaries. Taking into account the specific characteristics of the situation before it, the Court held that notice mailed, without proof of delivery, to interested parties whose addresses were known was adequate notice, and that newspaper notice was adequate for interested parties whose addresses were not known. Because all of the individual interests were identical, "notice reasonably certain to reach most of those interested in objecting [was] likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all." 339 U.S. at 319. "[U]nder such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable." *Id.* The Court concluded that because the bank had provided newspaper notice only, the notice was inadequate since "under the circumstances it [was] not reasonably calculated to reach those who could easily be informed by other means at hand." *Id.*

In *Mennonite Board of Missions*, the Court held that, when a mortgage holder is identified in a publicly-recorded mortgage, a state must provide notice to the mortgage holder by personal service or by mail to the last known address, prior to selling private property in a tax sale. 462 U.S. at 798.

Although the opinion treats mailed notice and personal service equally for purposes of that case, the Court was addressing a "sophisticated" and "particularly resourceful" creditor. *Id.* at 799, 800. The Court made clear that its decision did not retreat from the rule that "particularly extensive efforts to provide notice may often be required when the State is aware of a party's inexperience or incompetence." *Id.* at 799 (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13-15 (1978); *Covey v. Town of Somers*, 351 U.S. 141 (1956)).

These cases, and the Court's due process jurisprudence as a whole, reflect the principle, to which the Court has "adhered unwaveringly," that "the State must make efforts to provide *actual* notice to all interested parties." *Mennonite Bd. of Missions*, 462 U.S. at 796-97 (emphasis added). Thus, in *Hess v. Pawloski*, 274 U.S. 352 (1927), when this Court first recognized that service by registered mail, as opposed to personal service, could satisfy due process, the statute at issue required that the defendant "actually receive" the notice, *id.* at 356, and required the plaintiff to file the registered mail receipt, *signed by the defendant*, as proof that actual notice had been provided. *Id.* at 354. *Hess*, like subsequent cases, considered the method of notice in the context of the facts presented. *See id.* at 356. Since then, although it has become accepted that mail *may* provide a constitutionally adequate means of providing notice, one would search in vain for a declaration by this Court that mailed notice is per se adequate notice. *See Covey v. Town of Somers*, 351 U.S. at 147 (mailed notice inadequate in circumstances presented). Indeed, such a rule would contradict this Court's repeated admonition that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Restaurant Workers Union*, 367 U.S. at 895.

In short, this Court has allowed mailed notice to substitute for personal service where there was a sound basis to conclude that mail presented a reliable means of delivery, and thus of actual notice, to the intended recipient. At the same time, the Court has stated that circumstances could require more "extensive efforts to provide notice." *Mennonite Bd. of Missions*, 462 U.S. at 799. This case presents such circumstances. Mail sent in care of a prison is not a reliable means of getting notice to an inmate; but Petitioner, and inmates in similar circumstances, could "easily be informed by other means at hand." *Mullane*, 339 U.S. at 319.

In these circumstances, unlike those in *Mullane*, where numerous trust beneficiaries had identical interests, the inmate is almost always the *only* person whom the Government is seeking to inform of the proceedings. Therefore, unlike the beneficiaries in *Mullane*, if the inmate does not receive actual notice, no one will come forward to protect his or her interests. Moreover, unlike the bank in *Mullane*, the Government knows the exact location of the property owner. Unlike the mortgage holder in *Mennonite Board of Missions*, an inmate is unlikely to have a sophisticated "ability to take steps to safeguard its interests." 462 U.S. at 799. And, unlike the facts in both of those cases, when mail is sent to an inmate, it is not sent directly to its intended recipient, but through at least two additional intermediaries (mailroom staff and housing unit staff). As with the child's game of "telephone," the chance of error increases with each additional person through whom the message passes. Due process requires more than the notice the government attempted here.

B. Because The Forfeiture Was Effected Without Due Process, It Is Void.

1. "Forfeitures are not favored; they should be enforced only when within both [the] letter and spirit of the law." *United States v. One 1936 Model Ford Coach*, 307 U.S. 219, 226 (1939). And when an individual has been deprived of property without due process, "only 'wiping the slate clean . . . [will] restore[] the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.'" *Peralta v. Heights Medical Center*, 485 U.S. 80, 87 (1988) (citation omitted); *see also McDonald v. Mabee*, 243 U.S. 90, 92-93 (1917) ("personal judgment for money, invalid for want of service amounting to due process of law is . . . ineffective" and "was not merely voidable . . . but was void"). Thus, as held by the majority of the circuit courts to have considered the issue, a forfeiture proceeding conducted without proper notice to the property owner is void. *See One Toshiba Television*, 213 F.3d at 156; *United States v. Marolf*, 173 F.3d 1213, 1216 (9th Cir. 1999); *Clymore v. United States*, 164 F.3d 569, 573 n.5 (10th Cir. 1999); *Muhammed v. DEA*, 92 F.3d 648, 654 (8th Cir. 1996); *Barrera-Montenegro v. United States*, 74 F.3d 657, 661 (5th Cir. 1996); *United States v. Giraldo*, 45 F.3d 509, 512 (1st Cir. 1995); *see also United States v. 2751 Peyton Woods Trail*, 66 F.3d 1164, 1166-67 (11th Cir. 1995) (where forfeiture of real property void for lack of pre-seizure notice and hearing, new proceedings allowed "[i]f statutory time constraints permit"). *But see Dusenbery*, 201 F.3d at 768 (forfeiture voidable but not void); *Small*, 136 F.3d at 1338 (where property forfeited without adequate notice, inmate entitled to hearing on merits of claim; no discussion of statute of limitations); *Boero v. DEA*, 111 F.3d at 307 (same).

In this case, the statute of limitations allowed the Government five years from discovery of the offense to initiate

forfeiture proceedings. *See* 19 U.S.C. § 1621. At the latest, then, the statute began to run in April 1986, when Petitioner was arrested and the $21,939 was seized. Petitioner did not receive notice of the forfeiture until 1994, in the Government's response to his motion for return of property. *See* R 85, 103. In these circumstances, where the Government failed to give constitutionally adequate notice within the statutory period, the forfeiture is not only void, but the motion for return of property must be granted.

Statutes of limitations "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citation omitted). Limitations periods "afford[] plaintiffs what the legislature deems a reasonable time to present their claims" and "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by" loss of evidence, disappearance or death of witnesses, fading memories, or otherwise. *Id.* For example, in a forfeiture case, proof of legitimate ownership may disappear, and the owner's memory of the source or value of property may fade.

Although statutes of limitations may sometimes be tolled on equitable grounds, *see* 4 C. Wright & A. Miller, *Federal Practice & Procedure* § 1056 & cases cited at n.25.1 (2d ed. Supp. 2000), where the statute has expired due to the government's own failure to provide due process--an omission entirely in the Government's control—equitable tolling is inapplicable. *See United States v. Giovanelli*, 998 F.2d 116, 119 (2d Cir. 1993) (forfeiture statutes "impose no duty on a defendant to prevent the government from losing its rights through carelessness"). Moreover, in this case, the Government

has never contested that Petitioner did not receive actual notice, *see*, *e.g.*, JA 40, and has never suggested that Petitioner acted improperly in not moving sooner for return of his property. For example, the Government has never argued that Petitioner knew of the forfeiture proceeding but sat on his rights until the statute of limitations had expired. Instead, it has accepted Petitioner's statement that he never received actual notice and, essentially, responded "tough luck." Congress' judgment, however, as expressed in the statute of limitations provision, 19 U.S.C. § 1621, is to the contrary. *Cf. United States v. Brockamp*, 519 U.S. 347, 350-51 (1997) (no equitable tolling of tax code limitations period where limitations set out in detail and "statute sets forth explicit exceptions to its basic time limits, and those very specific exceptions do not include 'equitable tolling'").

2. In the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (2000) (codified at 18 U.S.C. § 983), Congress tried to respond to some of the due process problems manifested by the many post-forfeiture challenges in this and other contexts. The Act does not specify how notice is to be provided but does outline a procedure for challenging a forfeiture for lack of notice. The Act provides that, if the challenge is successful, the Government may commence a new forfeiture proceeding "[n]otwithstanding the expiration of any applicable statute of limitations." Pub. L. No. 106-185, § 2(a) at § 983(e)(2)(A). This provision illustrates that Congress was aware that the Government often faces a statute of limitations problem after a forfeiture is void for lack of notice and that it wanted to remove that barrier to commencing a new forfeiture proceeding.

As the Government recognizes, *see* Cert. Opp. at 11, the 2000 Act is applicable only to forfeiture proceedings

commenced on or after August 23, 2000, and does not apply to Petitioner's case. *See* Pub. L. No. 106-185, § 21. Here, the forfeiture is void, and the parties therefore return to the same positions they were in before the proceedings began. Because Congress does not permit forfeiture proceedings commenced prior to August 23, 2000, to be initiated more than five years after seizure of the property, the Government may not now bring a forfeiture action against Petitioner's $21,939.

CONCLUSION

For the foregoing reasons, the decision of the Sixth Circuit should be reversed and the case remanded with instructions that the forfeiture is void.

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No. 00-6567

In the Supreme Court of the United States

LARRY DEAN DUSENBERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the United States satisfied the notice requirements of the Due Process Clause by sending a federal prisoner notice of an administrative forfeiture proceeding by certified mail addressed to the prisoner at the prison where he was incarcerated.

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TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	3
Summary of argument	10
Argument:	
The United States provides a prisoner with adequate notice of an administrative forfeiture proceeding by sending written notice of the proceeding by certified mail addressed to the prisoner at the prison where he is incarcerated	12
A. The Due Process Clause requires notice reasonably calculated, under the circumstances, to apprise a claimant of the forfeiture proceeding	14
B. The government's practice of sending a prison inmate written notice of forfeiture proceedings by certified mail addressed to the prison where the inmate is incarcerated is a reasonable means for informing the inmate of the proceeding	15
C. Petitioner's conjecture that prisons receive inmate mail, but do not deliver it to inmates, is unfounded	21
D. Petitioner's proposed rule that the government must prove actual receipt of notice finds no support in this Court's decisions and is not warranted by petitioner's policy justifications	25
E. Petitioner is mistaken in claiming that inadequate notice would render a forfeiture "void" and entitle him to return of forfeited property	34
Conclusion	38

TABLE OF AUTHORITIES

Cases:	Page
Boero v. *DEA*, 111 F.3d 301 (2d Cir. 1997)	35
City of New York v. *New York, New Haven & Hartford R.R.*, 344 U.S. 293 (1953)	11, 17
Clymore v. *United States*:	
164 F.3d 569 (10th Cir. 1999)	36
245 F.3d 1195 (10th Cir. 2001)	36
Covey v. *Town of Somers*, 351 U.S. 141 (1956)	17
Estate of Pope, In re, 808 P.2d 640 (Okla. 1990)	28
Foehl v. *United States*, 238 F.3d 474 (3d Cir. 2001)	36
Greene v. *Lindsey*, 456 U.S. 444 (1982)	10, 11, 14, 18, 20, 30
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1991)	37
Krecioch v. *United States*, 221 F.3d 976 (7th Cir.), cert. denied, 121 S. Ct. 599 (2000)	13
Mathews v. *Eldridge*, 424 U.S. 319 (1976)	11, 26, 27
Medina v. *California*, 505 U.S. 437 (1992)	26
Mennonite Bd. of Missions v. *Adams*, 462 U.S. 791 (1983)	*passim*
Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)	10, 11, 13, 14, 15, 16, 20, 21, 26
Procunier v. *Martinez*, 416 U.S. 396 (1974)	30
Robinson v. *Hanrahan*, 409 U.S. 38 (1972)	25
Schroeder v. *City of New York*, 371 U.S. 208 (1962)	11, 18
Small v. *United States*, 136 F.3d 1334 (D.C. Cir. 1998)	4, 36
Thornburgh v. *Abbott*, 490 U.S. 401 (1989)	30
Tulsa Prof'l Collection Servs., Inc. v. *Pope*, 485 U.S. 478 (1988)	10, 14, 15, 19, 20, 27-28, 32

Cases—Continued:	Page
United States v. *Clark*, 84 F.3d 378 (10th Cir. 1996)	13, 30
United States v. *Dusenbery*:	
No. 94-3804, 1996 WL 306517, 89 F.3d 836 (6th Cir), cert. denied, 519 U.S. 956 (1996)	7
201 F.3d 763 (6th Cir.), cert. denied, 121 S. Ct. 301 (2000)	8, 35-36
United States v. *Five Thousand Dollars in U.S. Currency*, 184 F.3d 958 (8th Cir. 1999)	13, 31
United States v. *James Daniel Good Real Prop.*, 510 U.S. 43 (1993)	14
United States v. *Minor*, 228 F.3d 352 (4th Cir. 2000)	13, 20, 32, 36
United States v. *One Toshiba Color Television*, 213 F.3d 147 (3d Cir. 2000)	13, 20, 22, 23, 30, 32, 36
United States v. *Real Prop. (Lido Motel)*, 135 F.3d 1312 (9th Cir. 1998)	13, 30
Walker v. *City of Hutchinson*, 352 U.S. 112 (1956)	11, 17
Weigner v. *City of New York*, 852 F.2d 646 (2d Cir. 1988), cert. denied, 488 U.S. 1005 (1989)	20, 30
Weng v. *United States*, 137 F.3d 709 (2d Cir. 1998)	13, 31
Whiting v. *United States*, 231 F.3d 70 (1st Cir. 2000)	13, 16, 17, 21, 23, 30
Constitution, statutes, regulations and rules:	
U.S. Const. Amend. V (Due Process Clause)	2, 10, 12, 13, 14, 26, 29, 34
Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (to be codified at 18 U.S.C. 981 *et seq* (2000))	5, 12, 37
§ 2, 114 Stat. 202 (18 U.S.C. 983(a)(1)(A)(i) (2000))	5
§ 2, 114 Stat. 204 (18 U.S.C. 983(a)(2)(B) (2000))	5
§ 2, 114 Stat. 207 (18 U.S.C. 983(e)(1) (2000))	37

Statutes, regulations and rules—Continued:	Page
§ 2, 114 Stat. 208 (18 U.S.C. 983(e)(2)(A) (2000))	37
§ 21, 114 Stat. 225	5
19 U.S.C. 1600 *et seq.*	4
19 U.S.C. 1607 (1994 & Supp. V 1999)	3
19 U.S.C. 1607(a) (1988)	3, 4, 5
19 U.S.C. 1607(a) (1994 & Supp. V 1999)	4, 37
19 U.S.C. 1608	4
19 U.S.C. 1609	4-5, 37
19 U.S.C. 1621	34
21 U.S.C. 848	7
21 U.S.C. 881 (1988)	2
21 U.S.C. 881 (1994 & Supp. V 1999)	3
21 U.S.C. 881(a) (1994 & Supp. V 1999)	3, 4
21 U.S.C. 881(a)(6) (1988)	2
21 U.S.C. 881(a)(6)	5, 7
21 U.S.C. 881(d)	2, 3, 4
21 C.F.R:	
Sections 1316.71 *et seq.*	5
Section 1316.75(a)	4
28 C.F.R. 540.12(c)	29
Fed. R. Civ. P:	
Rule 4(d)	26
Rule 4(e)	26
Fed. R. Crim. P.:	
Rule 41(e)	8, 9
Rule 54(b)(5)	8
Miscellaneous:	
Bureau of Justice Statistics, *Bulletin: Prisoners in 1999* (8/00 NCJ 183476)	23
BOP Operations Memorandum 035-99 (5800) (July 19, 1999)	24
BOP Program Statement 5800.10 (Nov. 3, 1995)	23
Section 5800.10.305	29
Section 5800.10.409	24, 29
Section 5800.10.409A	24

In the Supreme Court of the United States

No. 00-6567

LARRY DEAN DUSENBERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 67-71) is reported at 223 F.3d 422. The order of the district court (J.A. 55-66) is reported at 34 F. Supp. 2d 602. A prior opinion of the court of appeals (J.A. 31-35) is unpublished, but the decision is noted at 97 F.3d 1451 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2000. A petition for rehearing was denied on August 25, 2000. The petition for a writ of certiorari was filed on October 16, 2000, and was granted on February 26, 2001. 121 S. Ct. 1186 (2001). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states: "No person shall be * * * deprived of life, liberty, or property, without due process of law."

Title 21, United States Code, Section 881 (1988), provided in relevant part at the time of this dispute:

> **(a) Subject property**
>
> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> * * * * *
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.
>
> * * * * *
>
> **(d) Other laws and proceedings applicable**
>
> The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws * * * shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof.

Title 19, United States Code, Section 1607(a) (1988), provided in relevant part at the time of this dispute:

> If– (1) the value of such seized vessel, vehicle, aircraft, merchandise, or baggage does not exceed $100,000; * * * the appropriate customs officer shall cause a notice of the seizure of such articles and the intention to forfeit and sell or otherwise dispose of the same according to law to be published for at least three successive weeks in such manner as the Secretary of the Treasury may direct. Written notice of seizure together with information on the applicable procedures shall be sent to each party who appears to have an interest in the seized article.

STATEMENT

The United States may seize and subject to forfeiture money and other property obtained through, or used to facilitate, violation of the federal controlled substance laws. See 21 U.S.C. 881(a) (1994 & Supp. V 1999). After petitioner's conviction on a federal drug charge, the government issued notice, in accordance with 21 U.S.C. 881(d) and the notice requirements of 19 U.S.C. 1607 (1994 & Supp. V 1999), that it intended to initiate administrative forfeiture of $21,939 in cash seized at the time of petitioner's arrest. Following the forfeiture, petitioner brought suit seeking return of the cash on the ground that he did not receive actual notice of the forfeiture proceeding. The district court granted the government's motion for summary judgment, J.A. 55-66, and the court of appeals affirmed, J.A. 67-71.

1. Section 881 of Title 21, United States Code, authorizes the United States to seek civil forfeiture of funds that are the proceeds of, or are used to facilitate,

unlawful transactions in controlled substances. See 21 U.S.C. 881(a) (1994 & Supp. V 1999). Section 881(d) further provides that the government may proceed through the forfeiture procedures set out in the customs laws. 21 U.S.C. 881(d). Those laws, which are found in 19 U.S.C. 1600 *et seq.*, authorize the government to conduct administrative forfeitures. See 19 U.S.C. 1607(a) (1994 & Supp. V. 1999). The administrative forfeiture process allows the government to determine whether property in its custody is unclaimed and, if it is, to take ownership without unnecessary judicial forfeiture proceedings. See *Small* v. *United States*, 136 F.3d 1334, 1335 (D.C. Cir. 1998).[1]

Congress has provided that notice of a proposed administrative forfeiture "be sent to each party who appears to have an interest in the seized article" and also that notice be published, as provided by regulation, for at least three successive weeks. 19 U.S.C. 1607(a) (1994 & Supp. V. 1999). See 21 C.F.R. 1316.75(a) (requiring publication "in a newspaper of general circulation in the judicial district in which the processing for forfeiture is brought"). At the time of the forfeiture at issue in this case, claimants had a period of 20 days from the date of first publication of the notice in which to file a claim. 19 U.S.C. 1608. If a claim was filed within the prescribed period, the government was entitled to seek forfeiture of the property only through judicial proceedings. *Ibid.* If no claim was filed within the prescribed period, the government could declare the property forfeited. 19

[1] At the time of the forfeiture at issue here, property valued at $100,000 or less was subject to administrative forfeiture. 19 U.S.C. 1607(a) (1988). Under current law, property valued at $500,000 or less is subject to administrative forfeiture. 19 U.S.C. 1607(a) (1994 & Supp. V. 1999).

U.S.C. 1609. That general statutory framework remains in place. See 21 C.F.R. 1316.71 *et seq.*[2]

2. In April 1986, petitioner was arrested on drug and possession of firearms charges at his residence near Cleveland, Ohio. J.A. 1, 32, 56. He pleaded guilty to a drug charge and, on July 15, 1986, was sentenced to a term of 12 years' imprisonment, to be followed by a six-year term of special parole. J.A. 1-2. During a search of petitioner's residence at the time of his arrest, law enforcement agents seized $21,939 in cash, as well as drugs, drug paraphernalia, firearms, an automobile, and other property. See J.A. 32-33; Dist. Ct. Mem. Op. App. 1 (Oct. 5, 1995) (R. 218-223) (inventory).

In November 1988, the Federal Bureau of Investigation (FBI) initiated administrative forfeiture proceedings against the $21,939, pursuant to 21 U.S.C. 881(a)(6). The FBI provided notice of the proposed forfeiture in accordance with 19 U.S.C. 1607(a) (1988), as in effect at that time. The FBI placed the required three-week publication in a major Cleveland

[2] Congress modified the procedures applicable to civil forfeiture proceedings through the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, 114 Stat. 202, to be codified at 18 U.S.C. 981 *et seq.* (2000). The changes enacted in the CAFRA apply only to forfeiture proceedings commenced on or after August 23, 2000. See Pub. L. No. 106-185, § 21, 114 Stat. 225. Among other changes, the CAFRA lengthens the period within which a claim may be filed. See 18 U.S.C. 983(a)(2)(B) (2000). The new legislation also directs that "notice shall be sent in a manner to achieve proper notice as soon as practicable," see 18 U.S.C. 983(a)(1)(A)(i) (2000). While the CAFRA does not expressly prescribe any particular form or manner of providing notice, the CAFRA does contemplate that notice may be provided by letters mailed to potential claimants, see 18 U.S.C. 983(a)(2)(B) (2000) (providing that a time limit for filing claims runs the date a "personal notice letter" is mailed).

newspaper, the *Plain Dealer*, during November and December 1988. J.A. 24-30. On November 7, 1988, the FBI additionally sent written notice of the forfeiture action by certified mail, return receipt requested, to petitioner. See J.A. 18-20. The FBI mailed the written notice to petitioner at the Federal Correctional Institution (FCI) in Milan, Michigan, where petitioner was then incarcerated as a result of his drug conviction. J.A. 21. That notice set out the basis for the forfeiture, explained the procedure for contesting the forfeiture of the funds, and specified that any claim to the property must be filed by December 19, 1988, six weeks from the date of the letter. See J.A. 18-21.[3]

At the time that the FBI sent the forfeiture notice to the Milan FCI, the prison had in place standard practices for handling inmate mail. See J.A. 36-37. The FCI sent mail room employees to the City of Milan post office to pick up mail for the prison, including mail addressed to prisoners. J.A. 36. While at the post office, the employees signed return receipts for certified mail, including certified mail addressed to inmates, and they then brought the mail to the Milan FCI mail room. *Ibid.* At the prison mail room, the prison employees recorded all certified mail in a mail room log book. J.A. 37. An employee assigned to the inmate's housing unit then delivered the mail to the inmate. *Ibid.* Before removing certified mail from the mail room, the employee signed the log book to acknowledge

[3] The FBI also mailed the written notice to two other addresses, including petitioner's residence at the time of his arrest. J.A. 22-23. The Postal Service returned one of the latter two notices as unclaimed, while the receipt for the other was returned bearing the signature "Edward F. Clouse." See *ibid.*

receipt of the individual piece of certified mail. *Ibid.* See J.A. 46-54, 60 n.6.[4]

In the case of the FBI forfeiture notice sent to petitioner at the Milan FCI, Inmate Systems Officer James Lawson, a mailroom employee, signed the return receipt at the Milan post office. J.A. 36, 49-50. Lawson, who submitted an affidavit and testified by deposition in this case, identified his signature on the return receipt, and he described the Milan FCI's procedure for recording and delivering certified mail. J.A. 36-38, 46-53. By the time of Lawson's 1997 deposition, the mail room log book pertaining to the delivery of the 1988 forfeiture notice no longer existed. J.A. 37, 51-52, 60 n.6 (noting that under prison policy, the log books were generally destroyed after one year). Lawson attested, however, that, "pursuant to the business practices of FCI Milan [the 1988 forfeiture notice for the currency] should have been received by the inmate." J.A. 37, 52.

Petitioner did not respond to the forfeiture notice. On January 27, 1989, in accordance with 21 U.S.C. 881(a)(6), the currency was declared administratively forfeited to the government. See J.A. 15.[5]

[4] Petitioner raised the question in the district court proceedings whether an additional log book was maintained to record the final delivery of the certified mail to the inmate, but neither petitioner nor the government introduced evidence on that matter. See J.A. 52.

[5] During the time that petitioner was imprisoned, he continued to manage a drug distribution network. That conduct resulted in a separate conviction in 1994 of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848, and in the forfeiture of additional property. See *United States* v. *Dusenbery*, No. 94-3804, 1996 WL 306517, 89 F.3d 836 (Table) (6th Cir.) (unpublished decision affirming petitioner's continuing criminal enterprise conviction), cert. denied, 519 U.S. 956 (1996). The court of appeals later rejected petitioner's challenge to the validity of the

3. On November 12, 1993—more than six years after the FBI seized the currency and almost five years after the declaration of forfeiture—petitioner sought return of the cash and other property seized at the time of his 1986 arrest. Petitioner sought relief under Rule 41(e) of Federal Rules of Criminal Procedure, which provides in relevant part:

> A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court * * * for the return of the property on the ground that such person is entitled to lawful possession of the property.

Fed. R. Crim. P. 41(e). The court determined through briefing by the parties that the FBI had initiated forfeiture proceedings, that the defendant had failed to respond to the notice of forfeiture, and that the cash at issue in this case had been administratively forfeited. See Dist. Ct. Mem. Op. 1-9 (Oct. 5, 1995) (R. 207-215).

After ascertaining those facts, the district court denied petitioner's motion on jurisdictional grounds. See Dist. Ct. Mem. Op. 9-11 (R. 215-217). The court ruled that Rule 41(e) does not confer authority to resolve whether a claimant received adequate notice of a civil forfeiture. *Id.* at 9-10 (R. 215-216) (citing Fed. R. Crim. P. 54(b)(5) (stating that the Federal Rules of Criminal Procedure "are not applicable to * * * civil forfeiture of property for violation of a statute of the United States")).

Petitioner appealed, and the court of appeals vacated the district court's order and remanded for further

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forfeitures associated with that 1994 conviction, and this Court denied review. *United States* v. *Dusenbery*, 201 F.3d 763 (6th Cir.), cert. denied, 121 S. Ct. 301 (2000).

proceedings. J.A. 31-35. The court of appeals agreed that petitioner could not pursue his claim under Rule 41(e), but it concluded that the district court should have allowed petitioner to go forward with his action by construing petitioner's Rule 41(e) motion as a civil complaint seeking equitable relief. J.A. 32.

4. On remand, the district court allowed petitioner to conduct discovery and ultimately granted the government's motion for summary judgment. J.A. 55-66. The district court concluded that the government had provided petitioner with sufficient notice of the forfeiture proceeding for the $21,939 by sending notice by certified mail to petitioner at the Milan FCI where he was incarcerated. J.A. 59-62. The district court specifically credited the affidavit and deposition of James Lawson, the Milan FCI mail room employee who had signed the return receipt for the forfeiture notice and who had described the procedure at the Milan FCI for delivery of certified mail to inmates. J.A. 60-61.[6]

5. The court of appeals affirmed the district court's judgment. J.A. 67-71. The court agreed with the district court that there was no genuine issue that the government had mailed the forfeiture notice respecting the cash to petitioner at the Milan FCI, that a prison employee had signed the return receipt, and that the prison had a process for forwarding such mail to the inmate. J.A. 70. The court rejected petitioner's contention that the government was required "to show

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[6] The district court rejected petitioner's argument that notice was defective because the address on the notice mistakenly specified P.O. Box 100 for the Milan FCI, rather than P.O. Box 1000. As the court recognized, Lawson's declaration and testimony identifying his signature on the return receipt established that the Postal Service had placed the notice in the correct post office box. J.A. 59-61.

that the mail actually reached an inmate in order to satisfy requirements of due process." J.A. 70. Rather, the government must provide notice "reasonably calculated, under all the circumstances, to apprise [him] of the pendency of the action and afford [him] an opportunity to present [his] objections." *Ibid.* (quoting *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). "Because adequate notice was given, [petitioner] is not entitled to relief on this claim." *Ibid.*[7]

SUMMARY OF ARGUMENT

The United States satisfied the notice requirements of the Due Process Clause by sending petitioner written notice of the administrative forfeiture proceeding by certified mail addressed to the prison where he was incarcerated. That mode of providing notice satisfied due process because it provided notice "reasonably calculated" to apprise an interested party of the proceedings. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). See also *Tulsa Prof'l Collection Servs., Inc.* v. *Pope*, 485 U.S. 478, 482 (1988); *Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791, 795 (1983); *Greene* v. *Lindsey*, 456 U.S. 444, 449-450 (1982).

This Court has repeatedly stated, in a series of decisions spanning half a century and a wide variety of proceedings, that ordinary mail is a constitutionally adequate means of delivering notice to parties whose addresses are known. See, *e.g.*, *Tulsa Prof'l Collection Servs.*, 485 U.S. at 490 (probate creditor claims);

[7] The court of appeals also affirmed the district court's rejection of petitioner's claims respecting other property seized at the time of petitioner's 1986 arrest. J.A. 70-71. The disposition of petitioner's claims regarding that property is not within the scope of the question before this Court.

Mennonite Bd. of Missions, 462 U.S. at 798 (tax sale of real property); *Greene*, 456 U.S. at 455 (forcible entry and detainer proceedings); *Schroeder* v. *City of New York*, 371 U.S. 208, 213 (1962) (condemnation of real property); *Walker* v. *City of Hutchinson*, 352 U.S. 112, 116 (1956) (condemnation of real property); *City of New York* v. *New York, New Haven & Hartford R.R.*, 344 U.S. 293, 296-297 (1953) (bankruptcy creditor claims); *Mullane*, 339 U.S. at 317 (settlement of interests of beneficiaries in a common trust account).

Petitioner does not contend that providing notice of a forfeiture proceeding by mail is generally impermissible. Rather, petitioner's due process claim depends entirely on his conjecture that, while prisons receive mail on behalf of inmates, they do not reliably convey that mail to inmates. But petitioner has offered no evidence, apart from his assertion that he did not receive the government's notice in this case, that prison mail systems are unreliable. And the BOP's current mail procedures and the record in this case convincingly demonstrate that mailing a forfeiture notice to the inmate at his prison is "reasonably calculated" to reach the inmate. The courts below were therefore justified in rejecting petitioner's due process claim.

Petitioner's proposed rule that the government must prove actual receipt of notice is contrary to this Court's decisions, which have "adhered unwaiveringly to the principle" that due process is satisfied if the method of notice is "reasonably calculated" to reach the interested party. *Mennonite Bd. of Missions*, 462 U.S. at 797. The *Mullane* standard provides concrete and workable guidance in this case. There is no need or precedent for applying a balancing test under *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). In any event, application of the *Mathews* balancing test would not support a new due

process rule, uniquely applicable to prisoners, requiring proof of actual receipt. Petitioner's proposed rule is not only unnecessary and anomalous, but it would require the Court to become directly involved in formulating prison policy respecting the handling of inmate mail.

Petitioner is also mistaken in arguing that the supposedly inadequate notice here rendered the forfeiture "void" and entitled him to return of the forfeited property. His argument respecting the proper remedy if the Court finds the notice insufficient was not addressed by the courts below, was not included in the question on which this Court granted the petition for writ of certiorari, and is not properly before the Court. Petitioner is incorrect on the merits as well—if a claimant did not receive proper notice, his remedy is restoration of the right to contest the forfeiture. In any event, Congress has prospectively resolved that issue through the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202, and there is consequently no need for the Court to decide the matter.

ARGUMENT

THE UNITED STATES PROVIDES A PRISONER WITH ADEQUATE NOTICE OF AN ADMINISTRATIVE FORFEITURE PROCEEDING BY SENDING WRITTEN NOTICE OF THE PROCEEDING BY CERTIFIED MAIL ADDRESSED TO THE PRISONER AT THE PRISON WHERE HE IS INCARCERATED

Petitioner contends that the United States violated the Due Process Clause of the Fifth Amendment by failing to ensure that he actually received notice of the proceeding that the government had instituted to forfeit drug trafficking proceeds seized at the time of his arrest. The court of appeals correctly rejected that

contention. The notice requirements of the Due Process Clause are satisfied if the government provides notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The government's practice of sending a prison inmate notice by certified mail at the inmate's prison address is sufficiently reliable to satisfy the Due Process Clause.[8]

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[8] This issue has generated a conflict among the decisions of the courts of appeals. The First, Ninth, and Tenth Circuits, in addition to the court below in the present case, have ruled that sending notice by certified mail to an inmate at his place of incarceration is sufficient to meet the constitutional notice requirement for forfeitures and have not required the government to prove that the inmate actually received the notice. See *Whiting* v. *United States*, 231 F.3d 70, 76-77 (1st Cir. 2000); *United States* v. *Real Prop. (Lido Motel)*, 135 F.3d 1312, 1315-1316 (9th Cir. 1998); *United States* v. *Clark*, 84 F.3d 378, 381 (10th Cir. 1996); see also *Krecioch* v. *United States*, 221 F.3d 976, 980 (7th Cir.) (concession that notice mailed to inmate's place of incarceration was sufficient), cert. denied, 121 S. Ct. 599 (2000). The Third Circuit has held that mailing to an inmate's place of incarceration is sufficient if the government establishes that there are adequate delivery procedures within the prison. *United States* v. *One Toshiba Color Television*, 213 F.3d 147 (2000) (en banc); see also *United States* v. *Minor*, 228 F.3d 352, 357-358 (4th Cir. 2000) (dicta endorsing holding in *One Toshiba Color Television*). The Second and Eighth Circuits have ruled that certified mail notice to a federal prisoner of a forfeiture proceeding is constitutionally insufficient in the absence of proof of actual receipt of the notice. *Weng* v. *United States*, 137 F.3d 709, 712-715 (2d Cir. 1998); *United States* v. *Five Thousand Dollars in U.S. Currency*, 184 F.3d 958, 960 (8th Cir. 1999).

A. The Due Process Clause Requires Notice Reasonably Calculated, Under The Circumstances, To Apprise A Claimant Of The Forefeiture Proceeding

The Due Process Clause generally requires that the government provide individuals with "notice and an opportunity to be heard" before depriving them of property. *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993). *E.g.*, *Tulsa Prof'l Collection Servs., Inc.* v. *Pope*, 485 U.S. 478, 482 (1988). This Court established the controlling principle in *Mullane*, *supra*:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice *reasonably calculated*, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

339 U.S. at 314 (emphasis added). Accord, *e.g.*, *Tulsa Prof'l Collection Servs.*, 485 U.S. at 482; *Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791, 795 (1983); *Greene* v. *Lindsey*, 456 U.S. 444, 449-450 (1982).

The Court's decision in *Mullane* makes clear that the criterion for adequate notice is reasonableness:

> The notice must be of such nature as reasonably to convey the required information, * * * and it must afford a reasonable time for those interested to make their appearance * * *. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. "The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals."

Mullane, 339 U.S. at 314-315. "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is itself reasonably certain to inform those affected." *Id.* at 315.

The core issue in this case, accordingly, is whether the government's practice of sending a prison inmate written notice of forfeiture proceedings by certified mail addressed to the prison where the inmate is incarcerated is a reasonable means for informing the inmate of the proceeding. This Court's decisions, common experience, and the record in this case, all show that it is.

B. The Government's Practice Of Sending A Prison Inmate Written Notice Of Forfeiture Proceedings By Certified Mail Addressed To The Prison Where The Inmate Is Incarcerated Is A Reasonable Means For Informing The Inmate Of The Proceeding

This Court has recognized on a number of occasions that issuing notice of a government action or proceeding through publication of the notice in a newspaper provides a constitutionally adequate means of notifying potentially interested persons whose identity or interests are not known or readily ascertainable. *E.g.*, *Tulsa Prof'l Collection Servs.*, 485 U.S. at 491; *Mennonite Bd. of Missions*, 462 U.S. at 798; *Mullane*, 339 U.S. at 317. The Court has ruled, however, that more specific notice is required when the identity and address of a potentially interested party can be determined through reasonable means. In a long series of

decisions spanning half a century and a wide variety of proceedings, the Court has consistently endorsed ordinary mail as a constitutionally adequate means of delivering notice to parties whose addresses are known. Although the Court is well aware that mailing does not guarantee receipt, the Court has never required proof of actual receipt of a notice that is properly mailed.

In *Mullane*, the Court held that publication alone was insufficient under the Constitution to provide notice to beneficiaries of a common trust whose identities and addresses were known to the trustee, but it rejected the argument that personal service was required. 339 U.S. at 318-319. Applying a standard of reasonableness, the Court concluded that "ordinary mail to the record addresses" would be sufficient as it constituted "a serious effort" to inform the beneficiaries of the proceeding. *Id.* at 318. The Court stated that the mails "are recognized as an efficient and inexpensive means of communication." *Id.* at 319.[9]

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[9] Although this Court determined in *Mullane* that constitutionally adequate notice may be provided through "ordinary mail," *Mullane*, 339 U.S. at 318, the government follows the practice of sending forfeiture notices to prisoners by certified mail. The government's use of certified mail, although ordinary mail would suffice, demonstrates its commitment to provide notice "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315. See *Whiting*, 231 F.3d at 76 ("The mail is a well-recognized means of communicating important information, * * * and certified mail has further safeguards (*i.e.*, signature of recipient upon delivery and return of the signed receipt card)."). Petitioner disputes whether certified mail provides a more reliable means to accomplish the desired goal of providing forfeiture notice to prospective claimants, arguing that certified mail is no more likely to reach its destination than ordinary mail. Pet. Br. 18. But even if ordinary mail and certified mail are equally likely to reach their destinations, the return receipt feature of certified mail documents whether the mail has indeed arrived. The return receipt therefore provides useful information for verifying delivery of notice to the prison, even though the ultimate recipient is a federal prisoner and, for obvious reasons of prison security, is not allowed to visit the post office and personally sign for the item of mail.

The Court reached the same conclusion in *City of New York* v. *New York, New Haven & Hartford Railroad*, 344 U.S. 293 (1953). That decision overturned an order forfeiting New York City's liens on certain railroad property in a bankruptcy proceeding because the city received notice only by publication. As in *Mullane*, the Court found the procedure implemented inadequate because notice had not been mailed to the city. *Id.* at 296-297. "When the judge ordered notice by mail to be given the appearing creditors, New York City acted reasonably in waiting to receive the same treatment." *Ibid.*[10]

The Court concluded in *Walker* v. *City of Hutchinson*, 352 U.S. 112 (1956), that newspaper publication notice alone was insufficient to advise a known homeowner of a condemnation proceeding, but indicated that mailing a notice would have sufficed. *Id.* at 116 ("Even

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[10] Petitioner characterizes *Covey* v. *Town of Somers*, 351 U.S. 141 (1956), as an example of a case from the same time period in which "mailed notice [was] inadequate in circumstances presented." Pet. Br. 24. In that case, the Town of Somers attempted to foreclose on property of a mentally incompetent person. The Court found that notice was inadequate in that case, not because mailing the notice was an unreliable means of delivery, but because the recipient was known to be incompetent and unable to understand the contents of the delivered notice. 351 U.S. at 146-147. Petitioner does not claim to be mentally incompetent and *Covey* is therefore inapposite to the issue presented here. See, *e.g.*, *Whiting*, 231 F.3d at 76 (noting that *Covey* is clearly distinguishable from the inmate notice situation).

a letter would have apprised him that his property was about to be taken."). The Court considered a similar condemnation proceeding in *Schroeder* v. *City of New York*, 371 U.S. 208 (1962). It held that published notices, even when supplemented by posting notices near the affected property, constituted a constitutionally insufficient manner for notifying property owners. *Id.* at 211-214. But the Court adverted to the constitutional sufficiency of mailed notice, stating that "[w]here the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Id.* at 213. The Court stated that the city had failed in its constitutional obligation to "make at least a good faith effort to give [the information] personally to the appellant—an obligation which the mailing of a single letter would have discharged." *Id.* at 214.

In *Greene*, *supra*, the Court found that posting a copy of a notice of forcible entry and detainer proceedings on the subject premises did not satisfy the minimum standards for constitutionally adequate notice described in *Mullane*. 456 U.S. at 453-454. While the Court did not prescribe the form of notice that should be adopted, *id.* at 455 n.9 ("we hold only that posted notice pursuant to [the Kentucky statute] is constitutionally inadequate"), it explained that "the mails provide an 'efficient and inexpensive means of communication' * * * upon which prudent men will ordinarily rely in the conduct of important affairs," *id.* at 455.

The Court also endorsed mailing as a constitutionally adequate manner of providing notice in *Mennonite Board of Missions*, *supra*. The Court concluded that publication, posting, and mailing solely to the property owner were insufficient means to provide a mortgagee

with notice of a pending tax sale. 462 U.S. at 798-799. Rather, when the mortgagee is identified in the public record, "constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service." *Id.* at 798.[11]

Most recently, in *Tulsa Professional Collection Services, Inc.*, *supra*, the Court ruled that publication alone was an insufficient method of providing notice if used to extinguish the claims of known creditors of a decedent's estate. 485 U.S. at 485-490. The Court concluded that ordinary mailing of a notice to creditors would be constitutionally sufficient to meet the requirements of due process, stating that "[w]e have repeatedly recognized that mail service is an inexpensive and efficient

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[11] Petitioner suggests that the Court found simple mailing sufficient in *Mennonite* only because that case involved a "sophisticated" creditor with "ability to take steps to safeguard its interests." Pet. Br. 25 (citing *Mennonite*, 462 U.S. at 799). To the contrary, the Court's discussion of sophisticated creditors in *Mennonite* involved the rejection of a claim that some form of notice *less* than mailing would be sufficient because mortgagees were supposedly sophisticated creditors. The court noted that mortgagees are not necessarily sophisticated creditors, but went on to state generally that mailing, or other means as likely to ensure receipt of notice, is a constitutional means of providing notice to a party whose address is known:

> Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.

Mennonite, 462 U.S. at 800.

mechanism that is reasonably calculated to provide actual notice." *Id.* at 490.[12]

The Court's recognition of the adequacy of notice by mail comports with common experience. Mailing is a means of communication "upon which prudent men will ordinarily rely in the conduct of important affairs." *Greene*, 456 U.S. at 455. It is unquestionably a means of providing notice "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315. Indeed, the record in this case bears out that mail remains a generally reliable means of transmitting information: The FBI's mailing to petitioner at petitioner's prison address was received at the prison, notwithstanding a typographical error in the address. See note 6, *supra*. In any event, a prisoner is not entitled to more due process than other citizens, who must also face a minimal prospect that the mail might be lost or de-

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[12] In the *Tulsa* decision, the Court referred to notice by mail as providing "actual notice," but the Court by no means implied that notice by mail is ineffective unless actually received. See 485 U.S. at 489-490. Rather, the Court used that term to distinguish notice by mail from notice by publication, which is commonly described as a form of "constructive notice." *Mennonite*, 462 U.S. at 798. See *Tulsa*, 485 U.S. at 491 ("the Due Process Clause requires that appellant be given '[n]otice by mail or other means as certain to ensure actual notice'" (quoting *Mennonite*, 462 U.S. at 800)). See also *One Toshiba Color Television*, 213 F.3d at 155 n.3; cf. *Weigner* v. *City of New York*, 852 F.2d 646, 51 n.6 (2d Cir. 1988) (addressing ambiguity in references to "actual notice"), cert. denied, 488 U.S. 1005 (1989). Petitioner, along with some courts, see, *e.g.*, *Minor*, 228 F.3d at 358, uses the term "actual notice" to refer not to mailing alone but to the actual receipt of the notice by the intended recipient or to a standard requiring proof of that receipt. Because of the potential ambiguity, we have avoided use of the term "actual notice" in addressing the issue presented here.

livered to the wrong address. Hence, petitioner's claim that mailing a forfeiture notice to a prisoner is constitutionally inadequate hinges entirely on his conjecture that the prisons do not reliably convey inmate mail to the inmates. See Pet. 14. That conjecture is without foundation.

C. Petitioner's Conjecture That Prisons Receive Inmate Mail, But Do Not Deliver It To Inmates, Is Unfounded

Petitioner contends that notice by mail violates due process because there is a "significant risk that notice mailed to a jail or prison will not reach the inmate." Pet. Br. 14. But petitioner has offered no evidence, apart from his own assertion that he did not receive the government's notice in this case, that the mail system where he is incarcerated was unreliable. Petitioner's individual claim of non-receipt, even if true, falls far short of establishing a constitutional violation.

As we have explained, the question is whether the government has adopted a means of notice "reasonably calculated" to apprise petitioner of pending proceedings. *Mullane*, 339 U.S. at 314. As the courts below correctly recognized, the government is not required to show that an individual piece of mail "actually reached an inmate in order to satisfy requirements of due process." See J.A. 60, 70. Rather, the government is entitled to defend its notification procedure "on the ground that it is in itself reasonably certain to inform those affected." *Mullane*, 339 U.S. at 315. See *Whiting* v. *United States*, 231 F.3d 70, 76 (1st Cir. 2000) (*Mullane*'s "reasonably calculated" standard requires "likelihood, not certainty.").

The government demonstrated in the proceedings below that it was justified in relying on prison procedures for delivering mail to inmates. A Milan FCI

mail room employee described the prison's procedure for distributing mail at the time that the government mailed the notice in this case. See J.A. 36-37, 47-52. He explained how prison employees picked up prison mail at the post office, recorded receipt of certified mail, and delivered the mail to the prisoner. The government's uncontroverted evidence demonstrates that the government was entitled to expect that certified mail addressed to the prisoner at his prison address would reach the prisoner. See J.A. 37 ("based upon the attached certified receipt, the letter was delivered to FCI Milan, and pursuant to the business practices of FCI Milan it should have been received by the inmate").[13]

Petitioner seeks support for his assertion that a substantial mail delivery problem exists in penal facilities by a reference to decisions addressing claims that prisoners failed to receive forfeiture notices. Pet. Br. 14-15. Petitioner's citation to a modest number of cases is unconvincing when measured against a 1999 federal prison population of more than 135,000 inmates. See Bureau of Justice Statistics, *Bulletin: Prisoners in 1999* (8/00 NCJ 183476) (*available at* www.ojp.usdoj.gov/bjs/abstract/p99.htm.). Moreover, the decisions that petitioner cites involve only *claims* that notice was not received—claims often made long after the fact and not subject to verification. As Judge Boudin observed in *Whiting*, *supra*, a prisoner's claim in such a matter is not necessarily true:

> It is well to be realistic about the situation: given the incentives, inmate denials that mailed notice was actually received are doubtless much more common than misdelivery, and knowledge is probably widespread among defendants in drug cases that the government does look to harvest assets from drug dealers incident to criminal cases.

231 F.3d at 77. See *United States* v. *One Toshiba Color Television*, 213 F.3d 147, 159-160 (3d Cir. 2000) (en banc) (Alito, J., concurring and dissenting) (noting the lack of evidence of any systemic problem with delivery of mail sent to jails or prisons and observing that "[t]he mere fact that [the claimant] and a handful of other federal prisoners and detainees *have claimed* that they did not receive notice sent by mail to their facilities is hardly enough to show the existence of a serious problem").

Petitioner has provided no persuasive evidence that prison mail systems are unreliable. To the contrary, the Bureau of Prisons (BOP) has established standard procedures governing delivery of inmate mail, including certified mail, to ensure reliable delivery. See BOP Program Statement 5800.10 (Nov. 3, 1995) (*available at*

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[13] Petitioner makes much of the fact that the Milan FCI log books are no longer in existence to refute his claim of non-receipt. Pet. Br. 15 n.4. The FCI's mail delivery procedures in effect at the time of the forfeiture here were designed to assure delivery of mail and not to refute possible claims on non-delivery made many years later. Hence, log books that recorded the receipt and distribution of certified mail were not retained for an extended period. See J.A. 37, 51-52 (FCI log books were destroyed one year after they are "closed."). Petitioner also points out that the government did not produce a prison employee who remembered delivering the notice to petitioner. Pet. Br. 15 n.4. It is hardly surprising that prison employees would not recollect delivering a particular piece of mail to an individual many years after the fact. "Given the temporal gap that may separate a forfeiture from a due process challenge to the proceedings, it is easy to imagine situations in which proof of the delivery of notice may be unavailable, even if such notice was properly served." *One Toshiba Color Television*, 213 F.3d at 155.

www.bop.gov). The BOP's current practices demonstrate the government's commitment to providing inmates with reliable mail service and provide reasonable certainty that inmates, like the general public, will receive properly posted mail.

The current procedures specifically address the distribution of certified mail. They require prison employees handling certified mail to sign a written acknowledgment of possession of the mail before delivering it to the inmate. See BOP Program Statement 5800.10.409. Prison employees must not only record the receipt of the certified mail and its distribution, but the prisoner himself must sign a log book acknowledging delivery. BOP Program Statement 5800.10.409A ("A log shall be maintained which the inmate shall be required to sign prior to delivery, thus completing the chain of receipts."); see also BOP Operations Memorandum 035-99 (5800) (July 19, 1999) (providing additional guidance on handling of certified mail). Petitioner has provided no basis for doubting that BOP mail room employees, like postal employees, follow the prescribed procedures governing delivery of certified mail.[14]

In the face of the BOP's current policies and the record in this case, petitioner has failed to show a serious risk that inmates will not receive certified mail at prison. Petitioner has shown only that BOP's past

[14] The proceedings below did not resolve whether, in 1988, the the Milan FCI followed a policy of requiring the inmate to sign a log book to acknowledge receipt of certified mail. See J.A. 52. The existence of such log books cannot be conclusively determined because, under BOP's policy at that time, the FCI retained log books for one year and then destroyed them. *Ibid.* In 1999, BOP instituted a policy requiring retention of the log books for 30 years. See BOP Operations Memorandum 035-99 (5800) (July 19, 1999), as extended.

record retention policies are insufficient to refute conclusively his claim that he did not receive the notice at issue in this case. Given the absence of a sound foundation for petitioner's assertions about the risk of non-delivery of mail in federal penal facilities, there is no basis for imposing special due process requirements for notifying prisoners of forfeiture proceedings. Indeed, the government's practice of notifying inmates by certified mail addressed to the prison where they are incarcerated provides a *higher guarantee* of receiving notice than due process requires.[15]

D. Petitioner's Proposed Rule That The Government Must Prove Actual Receipt Of Notice Finds No Support In This Court's Decisions And Is Not Warranted By Petitioner's Policy Justifications

Petitioner posits that this Court's due process jurisprudence not only requires the government to utilize a means of notice that is reasonably calculated to apprise the inmate of a forfeiture proceeding, but also requires the government to prove that the inmate in fact received notice. Pet. Br. 11. Petitioner's position, however, is not only squarely inconsistent with this Court's decisions, but it has been rejected by a majority

[15] See note 9, *supra*. The government did not rely only on the prison mail system in this case, but also provided notice by publication and by mailing the forfeiture notice to petitioner's pre-incarceration addresses. Petitioner argues that those means of notice were unlikely to reach an inmate. Pet. Br. 13-14. But those means were not the only ones used. Cf. *Robinson* v. *Hanrahan*, 409 U.S. 38 (1972) (a forfeiture notice mailed solely to the prisoner's home address is not "reasonably calculated" to apprise the prisoner of a forfeiture proceeding). The government's use of those means of notice provided a supplement to the notice mailed to the prison address and increased the probability that petitioner would receive notice.

of the courts of appeals and is neither necessary nor desirable as a matter of sound policy.

As an initial matter, petitioner can point to no decision of this Court holding that the Due Process Clause not only requires the government to provide notice through means "reasonably calculated" to reach the recipient, *Mullane*, 339 U.S. at 314, but also requires the government to prove that the intended recipient actually received the notice. Every decision of this Court since *Mullane* has stated that the Due Process Clause is satisfied if the means of notice meets *Mullane*'s "reasonably calculated" standard. See pp 13-15, *supra*.[16]

Petitioner seeks to avoid this Court's contrary precedent by urging that the Court evaluate his entitlement to notice under the formula that the Court set out in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), for resolving due process challenges to the adequacy of administrative procedures affecting private interests. See Pet. Br. 12. This Court, however, does not apply the *Mathews* formula to all due process challenges. See, *e.g.*, *Medina* v. *California*, 505 U.S. 437, 443 (1992). When determining whether a means of notice complies with due process, the Court has consistently applied the

[16] Indeed, the rule petitioner urges would go beyond what the Federal Rules of Civil Procedure require for initiating a civil lawsuit. Rule 4(d) of those Rules generally requires personal service of process initiating a lawsuit, but that Rule does not require the plaintiff to prove that the intended recipient personally received the summons and complaint. Rule 4(e) of those Rules provides that service may be effected by leaving copies of the summons and complaint "at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." Fed. R. Civ. P. 4(e). Petitioner has not questioned the constitutionality of that Rule.

Mullane standard, which specifically focuses the due process inquiry on whether the method of notification is "reasonably calculated" to reach interested parties. See, *e.g.*, *Mennonite Bd. of Missions*, 462 U.S. at 797 ("this Court has adhered unwaiveringly to the principle announced in *Mullane*").

This Court should not replace the workable and well focused *Mullane* standard, which concentrates attention on whether the means of notice is likely to be effective, with the more general—and accordingly less certain—*Mathews* balancing test. But even if the Court were to do so here, the result would be the same. The *Mathews* analysis generally requires consideration and weighing of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335. The government's provision of notice through certified mail comports with due process when considered in light of those three factors.

First, the private interest at stake here—ownership of $21,939 in currency—is by no means insignificant. But the fact that the proceedings involve property of significant value does not mean that mailing is an inadequate means of notice. This Court has repeatedly recognized that notice may be provided by ordinary mail without regard to the value of the property at stake. See, *e.g.*, *Tulsa Prof'l Collection Servs.*, 485 U.S.

at 479 (notice of creditor claims against a decedent's estate, regardless of value); *Mennonite Bd. of Missions*, 462 U.S. at 798 (notice to mortgagees of tax sale of real property).[17]

Second, as previously discussed, petitioner has failed to establish that notifying inmates by certified mail at their prison address poses a significant risk of erroneous deprivation of property. See pp. 21-25, *supra*. There is correspondingly little probable value, from a due process perspective, in imposing additional or substitute procedural safeguards, such as petitioner's suggestion that the government "send the notice to a prison official, with a request that a prison employee watch the prisoner open the notice, cosign a receipt, and mail the signed paper back to the agency from which it came." Pet. Br. 17.

Third, petitioner's proposal subjects the government to significant and unnecessary fiscal, administrative, and security burdens. The BOP is charged with managing a prison population of more than 100,000 persons who receive a substantial amount of mail, including certified mail. Those inmates receive a significant number of legal notices, including notices of administrative forfeiture.[18] As noted previously, the BOP has

[17] The actual value of the creditor claim in *Tulsa* appears to have been $14,657.55, out of an original hospital bill of over $142,000, most of which was paid by insurance. See *In re Estate of Pope*, 808 P.2d 640, 641-642 n.3 (Okla. 1990). The Court's decision in *Mennonite* indicates that the amount of the mortgage due in that case was $8237.19. *Mennonite*, 462 U.S. at 794.

[18] The Department of Justice Consolidated Asset Tracking System (CATS) reports that, with respect to seizures in fiscal year 2000, the FBI and the Drug Enforcement Administration (DEA) sent out a total of more than 9000 administrative forfeiture notices to incarcerated individuals. Other agencies that conduct asset forfeiture programs, such as the Customs Service, may also have occasion to send notices to inmates. Furthermore, petitioner's theory might well require that various other types of notices affecting property interests, such as tax delinquency notices and foreclosure notices, would be subject to the same additional requirements he proposes.

developed detailed procedures for handling inmate mail, and it has developed policies respecting certified mail delivery that are adequate to ensure that inmates promptly and efficiently receive those notices. See BOP Program Statement 5800.10.409. There is no warrant for imposing, as a matter of constitutional law, additional burdensome requirements that have not been shown to be necessary.[19]

The *Mathews* balancing test accordingly does not support petitioner's contention. Rather, petitioner's invocation of that balancing test simply highlights that a departure from the *Mullane* standard would require the Court to become directly engaged in formulating prison policies respecting the handling of inmate mail. This Court has previously acknowledged that prison officials have considerable expertise in such matters

[19] The FBI and the DEA have adopted practices that already go far beyond what due process requires in ensuring that inmates receive administrative forfeiture notices. For example, BOP's procedures currently provide that certain types of mail, including appropriately marked congressional, judicial, law enforcement, and attorney correspondence, may be marked as "special mail" and opened only in the inmate's presence (but not by the inmate). See 28 C.F.R. 540.12(c); BOP Program Statement 5800.10.305. The FBI and the DEA inform us that, in recent years, those agencies have followed a practice of marking administrative forfeiture notices as "special mail." The Due Process Clause does not, however, require federal and state agencies and prisons to follow that practice, and it should not be imposed as a matter of constitutional law.

and that "the judiciary is 'ill-equipped' to deal with the difficult and delicate problems of prison management." *Thornburgh* v. *Abbott*, 490 U.S. 401, 407-408 (1989) (quoting *Procunier* v. *Martinez*, 416 U.S. 396, 404-405 (1974)). The Court has accordingly "afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world." *Id.* at 408. See *Greene*, 456 U.S. at 455 n.9 ("It is not our responsibility to prescribe the form of service that the [government] should adopt.").

The courts of appeals that have addressed the constitutional issue presented here have uniformly applied the *Mullane* standard, and most have concluded that the government's mailing of notice by certified mail to the inmate's prison address satisfies due process. See note 8, *supra* (collecting cases). See J.A. 70; *Whiting*, 231 F.3d at 76-77; *United States* v. *Real Prop. (Lido Motel)*, 135 F.3d 1312, 1315-1316 (9th Cir. 1998); *United States* v. *Clark*, 84 F.3d 378, 381 (10th Cir. 1996). Those courts have quite properly recognized that they are not empowered to formulate government procedures respecting notice, but instead are to ascertain "the bare minimum required by the Constitution." *Whiting*, 231 F.3d at 76; accord *One Toshiba Color Television*, 213 F.3d at 159 (Alito, J., concurring and dissenting); see *Weigner* v. *City of New* York, 852 F.2d 646, 650 (2d Cir. 1988) ("in deciding what the Constitution requires, we are not free to select forms of notice simply because they are advantageous"), cert. denied, 488 U.S. 1005 (1989).

The two courts of appeals that have required the government to prove actual receipt of notice have purported to apply the *Mullane* standard, but they have not relied on any documentation that prison mail

delivery is unreliable; rather, they have based their decisions on ad hoc pronouncements of "fundamental fairness" and the absence of agency "hardship." See *United States* v. *Five Thousand Dollars in U.S. Currency*, 184 F.3d 958, 960 (8th Cir. 1999) ("if the government is incarcerating the property owner when it initiates forfeiture proceedings, we have consistently held that fundamental fairness requires that the property owner or his or her counsel receive actual notice of the forfeiture in time to decide whether to compel the government to proceed by judicial condemnation"); *Weng* v. *United States*, 137 F.3d 709, 714-715 (2d Cir. 1998) ("where the owner is in federal custody on the very charges that justify a federal agency in seeking the forfeiture, there is no undue hardship to the agency in insuring that the owner-prisoner actually receive the legally required notification").

Even if it were permissible for courts to approach the due process issue here as a matter of what is "fair" or workable, the result the Second and Eighth Circuits have reached is neither. As the Third Circuit has pointed out, a new standard requiring proof of actual delivery is likely to reduce, rather than increase, the fairness and workability of administrative forfeiture proceedings:

> The real difficulty with the *Weng* rule lies not in requiring the government to demonstrate actual notice, but rather [in] the evidentiary burden that such a standard could impose after the passage of time. Given the temporal gap that may separate a forfeiture from a due process challenge to the proceedings, it is easy to imagine situations in which proof of the delivery of notice may be unavailable, even if such notice was properly served. An overly

> strict notice requirement, therefore, could lead to unsettling the outcome of completed proceedings based on nothing but bare allegations of a party who had lost property.

One Toshiba Color Television, 213 F.3d at 155; accord *United States* v. *Minor*, 228 F.3d 352, 358 (4th Cir. 2000). As we have explained, petitioner has failed to show any persuasive reason to doubt the reliability of the prison mail delivery system at the Milan FCI. His failure to carry his burden on that score should be dispositive of his due process claim.

Petitioner has identified three additional "factual circumstances" that he believes should "dictate the outcome here" (Pet. Br. 11): (1) the government knows where the petitioner is located; (2) the government has the ability to ensure actual delivery because it controls the prisoner's physical location; and (3) the government stands to gain financially by not providing adequate notice. See Pet. Br. 16-17, 19, 21-22. Those "factual circumstances"—which are more accurately described as policy arguments—do not warrant a requirement that the government prove that an inmate has actually received notice of a forfeiture proceeding.

The first of the petitioner's "factual circumstances"—the government's knowledge of the inmate's location—provides no basis for a special "inmate" rule. The Court has repeatedly indicated that notice by publication is insufficient, but notice by ordinary mail is sufficient, if a claimant's address is known or reasonably ascertainable. See, *e.g.*, *Tulsa Prof'l Collection Servs.*, 485 U.S. at 491; see also cases discussed at pp. 15-20, *supra*. Hence, the fact that the forfeiting agency can locate the inmate's address warrants notice by mail, but it does not warrant the additional step, unprecedented in this Court's decisions, of requiring proof of actual receipt.

Petitioner's second factual circumstance—the government's control over the inmate's location—distinguishes inmates from most other interested parties, but not in a way that is relevant to the due process issue posed here. There is no reason why the government's control over the inmate's location logically implicates a need for the government to prove actual receipt of notice. The question under *Mullane* is whether the notice is "reasonably calculated" to reach the inmate. If, as we have shown (pp. 21-25, *supra*), the mails are a reliable means of reaching the inmate, it is of no relevance to the *Mullane* inquiry that the inmate is reachable at a location that the government chose.

Petitioner's third factual circumstance—that the government would potentially gain financially if it could conduct forfeitures without providing adequate notice—similarly makes no logical sense. Petitioner implies, without foundation, that the government has a motivation to deprive petitioner of property without due process of law. The government is entitled to a presumption that it will act lawfully. But even if that were not so, the government's method of providing notice through certified mail is "reasonably calculated" to provide actual notice. See pp. 15-25, *supra*. Accordingly, there is no need for special precautions to prevent government malfeasance. The government has itself chosen means of providing notice that would defeat the government's supposed design to deprive individuals of their property without due process.

In short, petitioner has provided no persuasive reasons for this Court to depart from the *Mullane* standard of notice "reasonably calculated" to reach an interested party and to require the government to

prove actual receipt of notice. The Court has never invoked the Due Process Clause as a basis imposing an actual receipt requirement, and to do so here would introduce a anomalous departure from settled law.

E. Petitioner Is Mistaken In Claiming That Inadequate Notice Would Render A Forfeiture "Void" And Entitle Him To Return Of Forfeited Property

Petitioner argues that if this Court were to determine the government failed to meet the notice requirements of the Due Process Clause, the 1988 forfeiture of the currency at issue here would be "void" and the government would be barred by 19 U.S.C. 1621, the five-year statute of limitations relating to forfeitures, from reinstituting forfeiture proceedings. Pet. Br. 26-29. Petitioner further asserts that "the forfeiture is not only void, but the motion for return of property must be granted." *Id.* at 27. Under petitioner's view, if the Court determined that notice here was inadequate, he would be entitled to the $21,939 without regard to whether the money was derived from his drug trafficking activity.[20]

Petitioner's argument fails at the outset because it is not fairly subsumed within the question on which the petition for a writ of certiorari was granted, which

[20] Petitioner admitted at a district court evidentiary hearing that he had not been employed since 1983 and that, at the time of the April 1986 seizure, "most of my money" came from sales of illegal drugs. Tr. 15-16 (7/23/97) (District Court Docket Entry No. 147); see J.A. 64 (petitioner's admission that his 1985 automobile purchase was "probably" made with cash from cocaine sales); J.A. 63-64 (admissions that seized personal property was purchased with "drug money"); J.A 65, 71 (holdings of the courts below that personal property and automobile seized from petitioner were obtained with drug trafficking proceeds).

petitioner phrased as follows: "Should this court grant certiorari to resolve the split among the circuits as to whether a prisoner must receive 'actual notice' regarding a forfeiture notification?" Pet. ii. Petitioner's argument does not in any way address adequacy of notice to prisoners or, for that matter, to non-prisoners; it instead presents questions of remedy and procedure, applicable to prisoners and non-prisoners alike, that the courts below had no occasion to reach.

The court of appeals found that the notice to petitioner complied with the due process requirements of *Mullane*, and it therefore affirmed the district court's grant of summary judgment in favor of the government. J.A. 70. Accordingly, it did not address the appropriate disposition of petitioner's equitable claim for return of the currency in the event the notice had been constitutionally inadequate. If the ruling of the court of appeals on the notice question is reversed, further proceedings would be required in the courts below to determine in the first instance the appropriate disposition of petitioner's request for return of the currency.

But even if the question were properly before this Court, petitioner's contention is mistaken. If a defect in providing notice deprives a claimant of the right to contest the validity of a forfeiture, the claimant is entitled to restoration of the right lost, namely, the right to contest the forfeiture. See *Boero* v. *DEA*, 111 F.3d 301, 305-307 (2d Cir. 1997) (where the government fails to provide adequate notice and thereby deprives a claimant of the right to be heard, the "remedy is to restore his right to seek a hearing in district court"); accord *United States* v. *Dusenbery*, 201 F.3d 763, 768 (6th Cir.) ("Like the Second Circuit, we think that inadequate notices should be treated as voidable, not

void, and that the proper remedy is simply to restore the right * * * timely * * * notice would have conferred on the claimant: the right to judicially contest the forfeiture and to put the Government to its proofs under a probable cause standard."), cert. denied, 121 S. Ct. 301 (2000); *Small* v. *United States*, 136 F.3d 1334, 1338 (D.C. Cir. 1998) (where notice was found inadequate, case was remanded to the district court to grant the claimant a hearing on the merits of the forfeiture).

Some courts of appeals have agreed with petitioner's view that a forfeiture defective on grounds of inadequate notice is void. See, e.g., *Foehl* v. *United States*, 238 F.3d 474, 480-481 (3d Cir. 2001) (collecting cases). But, even where the statute of limitations has run, it does not appear that those courts would preclude all possible defenses to the return of the seized property. For example, in *One Toshiba Color Television*, the Third Circuit endorsed the view that a judgment issued without proper notice to a potential claimant is void, but it observed that a holding that a forfeiture was void "does not equate to a ruling that he is entitled to a return of the property or monetary relief from the government." 213 F.3d at 156-157 (noting that further proceedings were required in which the government could invoke defenses); see *Clymore* v. *United States*, 164 F.3d 569, 574 (10th Cir. 1999) (statute of limitations allowed to operate "subject, of course, to any available government arguments against it"); see also *Clymore* v. *United States*, 245 F.3d. 1195 (10th Cir. 2001) (prescribing procedures for "deficient notice" cases); cf. *United States* v. *Minor*, 228 F.3d at 360 (noting differing circuit rules as to applicable remedy where forfeiture is not supported by constitutionally adequate notice).[21]

In any event, there is no continuing need for this Court to address the additional question raised by petitioner because the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202, has resolved the issue with respect to forfeitures initiated after August 23, 2000. See note 2, *supra*. The current version of 18 U.S.C. 983(e)(1) (2000), enacted as part of that legislation, provides that "[a]ny person entitled to written notice in" an administrative forfeiture action "who does not receive such notice" may move to set the declaration of forfeiture aside. Section 983(e)(2)(A) further specifies that a finding that adequate notice was not provided is not fatal to the forfeiture, because "[n]otwithstanding the expiration of any applicable statute of limitations," a court granting such a motion must do so "without prejudice to the right of the Government to commence a subsequent forfeiture proceeding as to the interest of the moving party." 18 U.S.C. 983(e)(2)(A) (2000). Congress's prospective resolution of the issue eliminates any need for this Court to decide a matter that is not properly before it.

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[21] This Court has indicated that equitable tolling of the statute of limitations is appropriate where a party "actively pursue[s]" his rights before the statute runs, even if he does so by defective means, such as by filing a complaint in the wrong court. See *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 & n.3 (1991). Here, the government actively pursued its rights through the administrative forfeiture process Congress established by statute in 19 U.S.C. 1607(a) (1994 & Supp. V. 1999). It mailed notices to petitioner at three different locations and published notice in the newspaper. When petitioner failed to file a timely objection, the government duly entered a declaration of forfeiture, as it was entitled to do. See 19 U.S.C. 1609.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE
Supreme Court of the United States

LARRY DEAN DUSENBERY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

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20 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. DUE PROCESS REQUIRES THE GOVERNMENT TO ENSURE ACTUAL DELIVERY OF NOTICE BEFORE IT CAN FORFEIT AN INMATE'S PROPERTY. 2

A. The Circumstances Of Inmates Differ From Those Of Non-Inmates In Ways Material To The Due Process Analysis 3

B. The Analysis In *Mullane* Embodies The Three Prongs Of *Mathews v. Eldridge* 5

C. Under *Mullane* And *Mathews*, The Government Failed To Provide Adequate Notice To Petitioner Before Forfeiting His Property. 7

II. BECAUSE THE GOVERNMENT FAILED TO PROVIDE ACTUAL NOTICE, THE FORFEITURE IS VOID. 11

CONCLUSION 15

TABLE OF AUTHORITIES

CASES — Pages

Boero v. DEA,
111 F.3d 301 (2d Cir. 1997) 13

Cafeteria & Restaurant Workers Union v. McElroy,
367 U.S. 886 (1961) 4

Carlson v. Green,
446 U.S. 14 (1980) 12

Covey v. Town of Somers,
351 U.S. 141 (1956) 4

Greene v. Lindsey,
456 U.S. 444 (1982) 4, 6

Helling v. McKinney,
509 U.S. 25 (1993) 4

Houston v. Lack,
487 U.S. 266 (1988) 2

Irwin v. Department of Veterans Affairs,
498 U.S. 89 (1990) 13

Lepelletier v. FDIC,
164 F.3d 37 (D.C. Cir. 1999) 7

Mathews v. Eldridge,
424 U.S. 319 (1976) 1, 5

Medina v. California,
505 U.S. 437 (1992) 6, 7

Mennonite Board of Missions v. Adams,
462 U.S. 791 (1983) 6

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 1, 2, 4, 5, 13

Pollard v. United States,
352 U.S. 354 (1957) 11

Propert v. District of Columbia,
948 F.2d 1327 (D.C. Cir. 1991) 7

Robinson v. Hanrahan,
409 U.S. 38 (1972) 14

Schroeder v. City of New York,
371 U.S. 208 (1962) 6, 7

Small v. United States,
136 F.3d 1334 (D.C. Cir. 1998) 13

United States v. Dusenbery,
201 F.3d 763 (6th Cir. 2000) 12, 13

United States v. James Daniel Good Real Property,
510 U.S. 43 (1993) 7

United States v.Ursery,
518 U.S. 267 (1996) 7

Wolff v. McDonnell,
418 U.S. 539 (1974) 2

STATUTES AND RULES

18 U.S.C. § 983(e)(2)(A) 12

18 U.S.C. § 983 note 12

Federal Rule of Civil Procedure 4(e) 10

INTRODUCTION

Petitioner's opening brief explains why, under *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Government's attempt to provide notice of the forfeiture of his property did not satisfy due process. Where, as here, the Government knows exactly where the property owner is located and controls the owner's physical location, and where the Government could without undue burden ensure receipt of the notice, the balance of factors that guide due process analysis requires the Government to provide actual notice. Therefore, when challenged, the Government must show that the property owner actually received the notice.

Petitioner and the Government agree that due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Mullane*, 339 U.S. at 314. The parties' disagreement turns on how to apply that standard to forfeitures of federal inmates' property. Petitioner looks to the Court's due process jurisprudence, which recognizes the need to balance the risk of wrongful deprivation of property and the likely value of additional procedural protections, on the one hand, against the Government's interest, including the burdens imposed by providing the additional procedures, on the other. The Government does not dispute that better notice than that provided to Petitioner is feasible and not unduly burdensome. In fact, the Government repeatedly uses the Bureau of Prisons' *current* procedures for handling inmate mail, under which it could prove receipt of a notice mailed to and received by a federal inmate today, to demonstrate why notice mailed to an inmate satisfies due process. The current procedures, of course, were not used when the Government forfeited Petitioner's property.

In the Government's view, although notice must be "reasonably calculated" to inform property owners of forfeiture proceedings, that general guideline does not incorporate a balancing of considerations. Rather, the Government suggests, notice mailed to a person's current address is always "reasonably calculated, under all the circumstances" to apprise interested parties of potential deprivations of property, whatever the circumstances might be. In other words, according to the Government, mailed notice is always adequate notice. The Court has never previously endorsed this per se rule, and it should not do so here.

ARGUMENT

I. DUE PROCESS REQUIRES THE GOVERNMENT TO ENSURE ACTUAL DELIVERY OF NOTICE BEFORE IT CAN FORFEIT AN INMATE'S PROPERTY.

The Government's brief is based on *Mullane's* holding that due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314. At the same time, the brief fails to pay more than lip service to the circumstances presented here. Although this Court has recognized that the circumstances of inmates differ from those of free individuals in significant ways, *see, e.g., Houston v. Lack*, 487 U.S. 266 (1988) (circumstances justify deeming inmates' pro se notice of appeal mailed when delivered to prison mail room); *Wolff v. McDonnell*, 418 U.S. 539, 568-69 (1974) (circumstances justify rule against inmates confronting and cross-examining witnesses at disciplinary hearings), the Government dismisses those differences out of hand.

A. The Circumstances Of Inmates Differ From Those Of Non-Inmates In Ways Material To The Due Process Analysis.

The Government sidesteps the circumstances presented here by labeling as "policy arguments" the facts that it knows where federal inmates can be found at all times and even controls their physical location. Resp. Br. 32. In its view, these facts warrant mailed notice but no more. What the Government refuses to take into account, however, is that it not only knows each inmate's current address, it also owns the facility where the inmate is housed, operates it, controls its employees, and has full access to both the facility and the people who reside there. The Government's only response to these facts is the conclusory statement that "[t]here is no reason why" they should require it to prove receipt of notice. Resp. Br. 33. In fact, there is a very important reason why the Government's control over where the inmate is at any particular moment of every day affects the notice requirement here: Those circumstances guarantee that the Government can deliver a notice to an inmate and obtain proof of receipt, which is not true of the circumstances of non-inmates.

In addition, property owners who are not incarcerated can generally monitor their property and in that way protect their property rights. For example, an owner can see that the car is in the driveway each morning. Inmates cannot do so; they do not have access to most of their property. Moreover, most property owners receive mail directly from the postal service. Inmates do not; they receive mail only through prison staff. The extra hands through which the mail passes increase the potential for non-delivery, for example, through inadvertence, incompetence, or ill-will between a guard and an inmate. Indeed, once the mailed notice reaches the prison, it leaves the postal system and enters the prison system—a

system that directly benefits from forfeitures. *See* Amicus Br. of DKT Liberty Project at 10 n.2 (prison construction is major component of spending from Asset Forfeiture Fund). This case is thus not analogous to the cases involving mail sent to a home or business. In those cases, the notice is delivered by a disinterested mail carrier directly to an address over which the addressee exercises dominion or control. In contrast, Petitioner had no control over the prison mailroom or the people who operated it.

The Government deems it "anomalous" to require that it ensure receipt by inmates when proof of receipt is not required with regard to notices sent to non-inmates. Resp. Br. 34. This Court has repeatedly explained, however, that the requirements of due process are flexible; they vary based on "all the circumstances." *See, e.g., Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) ("very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation"); *Mullane*, 339 U.S. at 313 (procedures must be "appropriate to the nature of the case"). Again, inmates' circumstances are different from those of the free individuals and companies in the cases on which the Government relies. *See also Helling v. McKinney*, 509 U.S. 25, 32 (1993) (Constitution imposes on government special duties with respect to people in its custody against their will) (citing *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989)). Indeed, changing the circumstances of living is much of the point of prison. This case would not be the first in which the Court has recognized that different circumstances require different processes. *See, e.g., Greene v. Lindsey*, 456 U.S. 444, 453 (1982) (posting notices on doors would satisfy due process in many cases but did not "in the circumstances of this case"); *Covey v. Town of Somers*, 351 U.S. 141 (1956) (in foreclosure action, notice by mailing,

posting, and publication inadequate where interested party was incompetent); *Mullane*, 339 U.S. at 318 (newspaper notice adequate for beneficiaries whose addresses unknown to trustee; notice by personal service or mail required for beneficiaries whose addresses known).

In short, the Government's approach reads "under all the circumstances" out of *Mullane* and undermines the flexibility at the core of this Court's due process jurisprudence.

B. The Analysis In *Mullane* Embodies The Three Prongs Of *Mathews v. Eldridge*.

Because it refuses to recognize a framework for evaluating *Mullane*'s phrase "reasonably calculated, under all the circumstances," the Government is reduced to arguing in conclusory fashion that the procedures in place when the Government forfeited Petitioner's property were reasonably calculated to provide notice, even if those procedures were not successful. *Mullane*, however, offers further guidance. *Mullane* took into account the fact that the property at issue was "a large number of small interests," 339 U.S. at 319, the practical difficulties and costs of ensuring notice to all beneficiaries, *id.* at 317-18, and the fact that notice received by most of the beneficiaries interested in objecting to the accounting would protect the interests of all, as the beneficiaries shared a common interest. *Id.* at 319. These points reflect the three factors later set forth by the Court in *Mathews v. Eldridge*: the private interest, the risk of error and probable value of additional or different procedures, and the burdens imposed by the additional procedures. 424 U.S. at 335. In essence, the *Mathews* test is a distillation of the concerns identified in *Mullane*. As noted above, the Government's contrary view can be supported only by reading "reasonably calculated" in isolation from the rest of the *Mullane* opinion.

The Government questions the applicability of the *Mathews* test to this due process challenge. Stating summarily that the *Mathews* test is "more general" than the *Mullane* standard, Resp. Br. 27, the Government urges this Court not to apply *Mathews*. However, although this Court has not stated expressly that the *Mathews* test applies to all due process challenges, it has consistently applied the concerns identified in *Mathews* when considering such questions. For instance, in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), the Court looked to both the mortgagee's "substantial property interest," *id.* at 798, and the degree of effort needed to ascertain the mortgagee's address, *id.* at 798 & n.4, to conclude that the mortgagee was entitled to receive mailed notice or personal service of notice of a tax sale. In *Greene v. Lindsey,* in which the Court considered the adequacy of eviction notices posted on apartment doors, the residents' interest in continued tenancy in their homes (private interest at stake), 456 U.S. at 450-51, the evidence that children tore the eviction notices off the apartment doors (risk of erroneous deprivation), *id.* at 453-54, and the effect of mailing notices to tenants at the apartment addresses (value and burden of additional procedures), *id.* at 455, all played a role in the Court's decision that posted notices had to be supplemented by mailed notices. And in *Schroeder v. City of New York*, 371 U.S. 208 (1962), the Court cited the small chance that the property owner would see the published and posted notices of condemnation proceedings (the likelihood of erroneous deprivation), *id.* at 212, and the fact that the city knew the owner's name and address (the minimal burden on the city of mailing notice), *id* at 210, 213, in holding that the notices did not satisfy due process.[1]

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[1] The Government cites *Medina v. California*, 505 U.S. 437, 443 (1992), for the proposition that *Mathews* does not apply to (continued...)

Admittedly, *Mathews* addressed the right to a pre-termination hearing; and the Court generally cites *Mullane*, rather than *Mathews*, when addressing the constitutional adequacy of notice. Nonetheless, the Due Process Clause, which is the source of both the notice and the hearing requirements, suggests no reason to distinguish hearing from notice for purposes of analyzing the adequacy of the process afforded. Indeed, to make such a distinction between notice and hearing would be illogical since, without adequate notice, the right to a hearing is meaningless. *See also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) (*Mathews* test used to assess need for predeprivation notice and hearing); *Lepelletier v. FDIC*, 164 F.3d 37, 45-46 (D.C. Cir. 1999) (*Mathews* test used to assess adequacy of notice); *Propert v. District of Columbia*, 948 F.2d 1327, 1332 (D.C. Cir. 1991) (same).

C. Under *Mullane* And *Mathews*, The Government Failed To Provide Adequate Notice To Petitioner Before Forfeiting His Property.

Turning to the *Mathews* test, the Government agrees that the private interest at stake—$21,939—is significant. Resp. Br. 27; *see also* Amicus Br. of DKT Liberty Project at 3

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[1](...continued)
all due process challenges. In fact, although *Medina* held that *Mathews* does not provide the appropriate framework for resolving challenges to rules that are part of the criminal process, it acknowledged that *Mathews* provides the general approach for resolving due process claims in civil proceedings. *Id.* at 444. Here, of course, the proceedings are civil, and *Medina* is inapposite. *See United States v. Ursery*, 518 U.S. 267 (1996).

(DOJ Asset Forfeiture Fund had balance of $647.5 million in 1998). As to the second factor, however, it disagrees that the procedures in place at the time it forfeited Petitioner's property posed a significant risk of erroneous deprivation and, therefore, sees little value in additional or different procedures. Resp. Br. 28. To address this consideration, the Government simply cites to the portion of its brief that purports to explain why its procedures for sending forfeiture notices to inmates are "reasonably calculated" to reach them. *Id.* (citing Resp. Br. 21-25). (In this way, the Government implicitly recognizes that *Mullane* and *Mathews* are based on similar considerations.) By reference to its earlier discussion, the Government's argument on this point has two parts. First, the Government says that its *current* procedures are sufficiently reliable. Resp. Br. 24. However, even if the procedures today are constitutionally adequate, Petitioner did not have the benefit of them; his property was forfeited in 1988.

Second, contrary to the Government's suggestion, Resp. Br. 29, Petitioner is not asking the Court to formulate prison mail policy. The question here is whether the Government must ensure successful delivery of forfeiture notices to federal inmates. If the answer to that question is yes, and if the mails and Bureau of Prison procedures for handling inmate mail meet that requirement, the procedures are adequate. If they are not, the Government—not this Court—must devise an alternate means of delivery. Again, given the Government's control over its own prisons and the location of inmates at all times of the day and night, it could certainly ensure that an inmate received a notice if it wanted to do so.

Third, the Government faults Petitioner for not offering evidence of a systemic problem. Resp. Br. 23. Petitioner offered evidence that he did not receive the notice sent to him and has cited numerous reported decisions presenting similar

circumstances. JA 45; Pet. Br. 14-15. Although the Government now questions the truthfulness of Petitioner's testimony, Resp. Br. 21, in the courts below it did not contest Petitioner's statement. Likewise, the decisions cited by Petitioner accept that the inmates did not receive the notices at issue. The Government's suggestion that this case and others may arise from inmates' false claims, Resp. Br. 23, is both self-serving and untimely.

Tellingly, the Government has no suggestion as to how an inmate would gather systemic evidence that mail delivery was unreliable, much less how Petitioner in 1993 (when he filed his motion for return of property) would have gathered evidence pertaining to delivery in 1988 (when the Government mailed the forfeiture notice). The problem with undelivered mail is that the addressee does not know that it has been sent, let alone that it has not been delivered. Furthermore, any such evidence would be in the Government's control, not in the control of a pro se inmate. The fact that the Government has made changes to its procedures for handling inmate mail since the time it forfeited Petitioner's property, *see* Resp. Br. 24 n.14, 29, suggests that it recognized a problem with the procedures in place at that time.

Addressing the third *Mathews* prong, the Government's brief contradicts itself. The Government argues that requiring it to obtain proof of receipt of notice, and thereby to ensure that actual notice was provided, would "subject[] the government to significant and unnecessary fiscal, administrative, and security burdens." Resp. Br. 28. Then, without stopping to explain why ensuring delivery of forfeiture notices would be so burdensome, the Government turns to a discussion of the procedures currently in place (but not in place when the Government forfeited Petitioner's property) to handle forfeiture notices sent to inmates by certified mail. The Government explains that,

today, a prison employee signs a log book to document both receipt and distribution of certified mail; the inmate-addressee also signs a log book to verify delivery, and forfeiture notices are opened in the presence of the inmate. Resp. Br. 24, 29 n.19. The prison retains the log books for 30 years. Resp. Br. 24 n.14. Thus, if delivery is successful, the current practices result in proof of actual delivery—the inmate's signature—and satisfy due process. Moreover, they negate any concerns that proof may be unavailable, Resp. Br. 22 n.13, 31, that staff memories of specific deliveries will necessarily fade, Resp. Br. 22 n.13, or that inmates will make false claims of non-delivery. Resp. Br. 23. In this way, the current practices set forth by the Government refute the claim of burden.

Petitioner's concern is not that the Government employ a particular means of providing notice, but rather that the means employed be successful. Thus, the Government's current procedures are adequate if they are successful; and, if they are successful, they will result in verification of delivery. But when they are not successful, the circumstances require—due process requires—that the Government try again, by a subsequent mailing or other means. In the case of Petitioner, the means used were not successful. Thus, due process was not satisfied.[2]

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[2] The Government suggests that its failure to ensure that Petitioner received a forfeiture notice is supported by Federal Rule of Civil Procedure 4(e), which allows a plaintiff to serve a summons and complaint by leaving copies at the defendant's "dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." As the Government states, Petitioner has not challenged the constitutionality of that Rule—which would pose a (continued...)

II. BECAUSE THE GOVERNMENT FAILED TO PROVIDE ACTUAL NOTICE, THE FORFEITURE IS VOID.

Petitioner has argued that, as held by the majority of circuit courts to have addressed the issue, a forfeiture effected without adequate notice is void. Therefore, if the statute of limitations on initiating a forfeiture has run, the Government must return the property it has taken without due process. The Government questions whether the issue is before the Court and challenges Petitioner's argument on its merits. The Government is incorrect on both counts.

A. First, Petitioner disagrees that this issue is not fairly included in the question presented. Because the issue will necessarily arise if the Court holds that Petitioner was not provided adequate notice, to hold that the forfeiture notice was inadequate without deciding the consequence of that holding would effectively be to leave the issue before the Court only half decided. Moreover, because the petition was filed pro se, it is appropriate to take a broader view of the question presented. *Cf. Pollard v. United States*, 352 U.S. 354, 359 (1957) (Court considered issue raised for first time in merits brief but noted that it might not have done so had petitioner been represented by counsel prior to merits stage). And because the Government's brief addresses the purely legal issue

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[2](...continued)
constitutional question not encompassed within the question presented in the Petition. In any event, to Petitioner's knowledge, that Rule has never been used to allow a plaintiff to effect service on an inmate-defendant by leaving copies of a summons and complaint with a prison guard, which is the only conceivable analogy to the situation presented here.

on the merits, the Court's consideration of it would not prejudice the Government.

Second, both the district court and the Sixth Circuit below effectively addressed this issue in the context of considering the fate of Petitioner's other forfeited property (his car and personal items). *See* Pet. Br. 7-8. Putting the cart before the horse, both courts held that, despite constitutionally inadequate notice, the forfeiture would stand because the property was traceable to drug proceeds. *See* JA 65, 71. In another case involving this Petitioner, cited by the Government, Resp. Br. 35, the Sixth Circuit held that inadequate notice renders a forfeiture voidable but not void. *See United States v. Dusenbery*, 201 F.3d 763 (6th Cir. 2000). The Sixth Circuit is thus in conflict with the majority of other circuit courts. *See* Pet. Br. 26. Accordingly, to send this case matter back to the Sixth Circuit to consider the issue with respect to Petitioner's $21,939 would be, respectfully, a waste of time. *Cf. Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) ("interests of judicial administration" served by addressing issue included in petition and briefed by the parties but not presented below).

Third, the Government argues that there is no "continuing need" to address this issue because Congress has prospectively resolved it in the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (2000). Resp. Br. 37. That statute provides that if a claimant successfully challenges a forfeiture for lack of notice, the Government may commence a new forfeiture action "[n]otwithstanding the expiration of any applicable statute of limitations." 18 U.S.C. § 983(e)(2)(A). This statute does not resolve the issue in this case, as it is applicable only to forfeitures commenced on or after August 23, 2000. *Id.* § 983 note. Indeed, as suggested in the opening brief, Pet. Br. 28, the statute is noteworthy here primarily because it reveals Congress's view on the merits of

the statute of limitations issue: It shows that Congress recognized that the Government's ability to forfeit inmates' assets was threatened when the Government failed to provide adequate notice and that Congress did not assume that equitable tolling was available to the Government in that circumstance.

B. On the merits, the Government's first point is that defective notice does not void a forfeiture. It offers no argument on this point, but instead cites to three circuit court cases. Two of the cases make no mention of a statute of limitations issue. *See Small v. United States*, 136 F.3d 1334 (D.C. Cir. 1998); *Boero v. DEA*, 111 F.3d 301 (2d Cir. 1997). The third, *United States v. Dusenbery*, 201 F.3d at 768, does take a view contrary to Petitioner's. It is also the only circuit court to make that explicit ruling. *See* Pet. Br. 26.

The Government next suggests that, even if the statute of limitations has run, it should be able to present "possible defenses" to a finding that the prior proceeding is void. Its only indication of what such a defense might look like in this case is contained in a footnote suggesting that equitable tolling is appropriate because it tried to give notice by "mail[ing] notices to petitioner at three different locations and publish[ing] notice in the newspaper." Resp. Br. 37 n.21. To begin with, as discussed in Petitioner's opening brief, equitable tolling does not apply here. Pet. Br. 27-28; *see also Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) (equitable tolling applied "sparingly").

In any event, neither the "mere gesture," *Mullane*, 339 U.S. at 315, of notice published in an Ohio newspaper, when the Government knew that Petitioner was incarcerated in Michigan, nor the notice sent to Petitioner's home address, when the Government knew that he was in a federal prison, can help the Government here. The patent inadequacy of both

forms of notice should have been clear to the Government when it used them in Petitioner's case. *See Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972).

As for the notice mailed to the prison, if the Court reaches the question of whether the forfeiture is void, it necessarily will have decided that the notice did not satisfy due process because the Government without undue burden could have and should have done more. The Government certainly could have sought to verify receipt of the notice prior to taking Petitioner's property. It had the means of doing so; in fact, when service is successful, it does so now. Resp. Br. 24. Yet it chose to proceed without knowing whether Petitioner had received the notice. Nonetheless, the Government states that it "actively pursued its rights through the administrative forfeiture process Congress established by statute in 19 U.S.C. 1607(a)." Resp. Br. 37 n.21. To the extent the Government is suggesting that its failure to provide notice should be excused because it was following a statutory procedure, that suggestion should be rejected. The statute does not address the means of providing notice (and, even if it did, could not override the Constitution). In addition, whereas the Government may have "actively pursued its rights," it did not actively provide due process. In such circumstances, equitable tolling should not apply.

CONCLUSION

For the foregoing reasons and the reasons set forth in Petitioner's opening brief, the decision of the Sixth Circuit should be reversed and the case remanded with instructions that the forfeiture is void.

Respectfully submitted,

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IN THE

Supreme Court of the United States

LARRY DEAN DUSENBERY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF *AMICUS CURIAE* OF THE DKT LIBERTY PROJECT IN SUPPORT OF PETITIONER

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21 pp

TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT .. 2

ARGUMENT 2

THE CIRCUMSTANCES OF THIS CASE REQUIRE ACTUAL NOTICE AS A MATTER OF DUE PROCESS 2

1. Where the Government Has a Financial Interest at Stake, Extra Efforts to Protect Due Process Are Justified. 2

2. The Circumstances of a Federal Inmate Require the Government to Provide Actual Notice of Forfeiture Proceedings. 7

3. In Other Civil Proceedings, Mailing Simply Raises a Rebuttable Presumption of Actual Notice. 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES Page

Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989) 6

Corporacion de Servicios Medicos Hospitalanos de Fajardo, 805 F.2d 440 (1st Cir. 1986) 10

Covey v. Town of Somers, 351 U.S. 141 (1956) 8

Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400 (1983) 9

Godfrey v. United States, 997 F.2d 335 (7th Cir. 1993) 14

Hagner v. United States, 285 U.S. 427 (1932) 14

Harmelin v. Michigan, 501 U.S. 957 (1991) 2, 3

Houston v. Lack, Warden, 487 U.S. 266 (1988) 11

Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978) 8

Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983) 8, 11

Missouri v. United States Bankruptcy Court for the Eastern District of Arkansas, 647 F.2d 768 (8th Cir. 1981) 9, 10

Muhammed v. Drug Enforcement Agency, 92 F.3d 648 (8th Cir. 1996) 6

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 7, 8, 14

Olmstead v. United States, 277 U.S. 438 (1928) 1

TABLE OF AUTHORITIES - continued

Page

United States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977) 9

United States v. $ 506,231 In United States Currency, 125 F.3d 442 (7th Cir. 1997) 6

United States v. All Assets of Statewide Automobile Parts, Inc., 971 F.2d 896 (2d Cir. 1992) 6

United States v. Bowen, 414 F.2d 1268 (3d Cir. 1969) 14

United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970) 9

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) 3

United States v. Winstar, 518 U.S. 839 (1996) 9

United States v. Woodall, 12 F.3d 791 (8th Cir. 1993) .. 13

Universal Life Church, Inc. v. United States, 128 F.3d 1294 (9th Cir. 1997) 10

In re University Medical Center, 973 F.2d 1065 (3d Cir. 1992) 10

Weng v. United States, 137 F.3d 709 (2d Cir. 1998) 13

Wisconsin ex rel. Flores v. Wisconsin, 516 N.W.2d 362 (Wis. 1994) 14

STATUTES

11 U.S.C. § 362(b) 9

19 U.S.C. § 1609 13

TABLE OF AUTHORITIES - continued

Page

Mo. Rev. Stat. § 513.623 5

LEGISLATIVE MATERIAL

Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 185, 114 Stat. 202 7

Civil Asset Forfeiture Reform Act: Hearings before the House Comm. on the Judiciary, 104th Cong. (July 22, 1996) (prepared statement of Stefan D. Cassella, Deputy Chief, Asset Forfeiture & Money Laundering Section, Dept. of Just.) 4

Civil Asset Forfeiture Reform Act: Hearings before the House Comm. on the Judiciary, 104th Cong. (July 22, 1996) (statement of Mr. Steve Komie, Secretary, Illinois State Bar Ass'n) 12

Cong. Rec. H4854 (June 24, 1999) (statement of Rep. Hyde) 7

Cong. Rec. H4863 (June 24, 1999) (statement of Rep. Frank) 7

H.R. Rep. No. 105-358 (Oct. 30, 1997) 3

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TABLE OF AUTHORITIES - continued

Page

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Dep't of Just., Audit Report, *Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statement for Fiscal Year 1998* (Sept. 1999) 3

Karen Dillon, *Lawmakers Again Hope to Tighten Up Law On Forfeitures*, Kansas City Star, Jan. 2, 1999 (available at www.kcstar.com /projects/drugforfeit/for3.htm) 5

Karen Dillon, *Police Sidestep Seizure Law, Report Says*, Kansas City Star, Jan. 11,2000 (available at www.kcstar.com/projects/ drugforfeit/for3.htm) 5

Double Jeopardy Clause - In Rem Civil Forfeiture, 110 Harv. L. Rev. 206 (Nov. 1996) 4

INTEREST OF *AMICUS CURIAE*[1]

Heeding the warning of Thomas Jefferson that "the natural progress of things is for liberty to yield and government to gain ground," the DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. It has been particularly vigilant in decrying the loss of liberties flowing from the so-called "war on drugs," not the least of which is the loss of property under the forfeiture statutes. Along with Justice Brandeis, the Liberty Project believe that it is

> immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, dissenting). Because the Liberty Project has a strong interest in protection of citizens against government overreaching, it is well-situated to provide this Court with additional insight into the issues presented in this case.

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[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus*, its members, or counsel contributed money or services to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

When the federal government seeks to forfeit property belonging to an inmate in a federal prison, due process requires that the government give actual notice of the forfeiture. Several circumstances combine to require this result. First, the forfeiting agency stands to directly benefit financially if no notice or inadequate notice is given. This disincentive to give proper notice must be countered by the requirement of actual notice. Second, the federal government completely controls the inmate's access to mail and information, and therefore bears a greater responsibility to see that notice is actually received that it might bear in the case of a free citizen. Third, because an inmate cannot control or monitor his property as can someone who is not incarcerated, the government cannot argue it is the inmate's own duty to find out about the forfeiture. Finally, neither other litigants nor a court can provide any protection for the inmate's property rights because no other litigants are involved and because there is no judicial review of an uncontested forfeiture.

ARGUMENT

THE CIRCUMSTANCES OF THIS CASE REQUIRE ACTUAL NOTICE AS A MATTER OF DUE PROCESS.

1. Where the Government Has a Financial Interest at Stake, Extra Efforts to Protect Due Process Are Justified.

"[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit." *Harmelin v.*

Michigan, 501 U.S. 957, 978 n.9 (1991) (opinion of Scalia, J.). In forfeiture proceedings, there can be little question that the government stands to benefit – sometimes enormously – if a forfeiture goes uncontested. Indeed, figures from the Department of Justice demonstrate that the level of forfeiture continues to grow. Deposits into the Department of Justice Asset Forfeiture Fund grew from $27 million in 1985 to $338 million in 1996. (H.R. Rep. No. 105-358, at 22 (Oct. 30, 1997) (accompanying H.R. 1965)). In 1998, a total of $448.9 million was deposited into the Fund, resulting in a balance of $647.5 million in forfeitures and seizures. (Dep't of Just., Audit Report, *Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statement for Fiscal Year 1998*, 6 (Sept. 1999) ("1998 Annual Report"). This governmental windfall is being shared with state and local governments specifically to encourage them to participate and assist in federal forfeitures: $171 million in 1998 and over $2 billion total since 1986. (1998 Annual Report at 60). In California alone, state and local law enforcement agencies and prosecutors' offices realized over $36 million just in 1999, and have received approximately $370 million since 1986. *Id.*

That the government has occasionally urged more forfeiture as a way of obtaining necessary monies is also no secret. A memorandum from the Attorney General's Office urged the U.S. Attorneys to increase their forfeitures to meet DOJ's annual budget target: "'We must significantly increase production to reach our budget target. . . . Failure to achieve the $470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990.'" *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 n.2 (1993) (citing and quoting Executive Office

for the United States Dep't. of Justice, 38 U.S. Att'y. Bull. 180 (1990)).

Of course, the *deposits* represent only the property the government actually ends up keeping -- the *seizures* often include far more than that. Indeed, although the Justice Department records show a total of $487.5 million deposited in 1995 (*Civil Asset Forfeiture Reform Act: Hearings before the House Comm. on the Judiciary*, 104th Cong. 217 (July 22, 1996) (prepared statement of Stefan D. Cassella, Deputy Chief, Asset Forfeiture & Money Laundering Section, Dept. of Just.), DOJ claimed it had seized over $1.3 billion just in the first nine months of that year. *Double Jeopardy Clause – In Rem Civil Forfeiture*, 110 Harv. L. Rev. 206, 215 & n.85 (Nov. 1996) (citing Memorandum from Chief, Asset Forfeiture & Money Laundering Section, U.S.D.O.J., dated Jan. 23, 1996).

The money flowing into federal, state, and local enforcement agencies from the forfeiture process is unprecedented, and the receiving agencies are virtually uncontrolled in how they choose to spend the money. For state and local agencies, the federal money is "off budget" so there is little accountability, not even to state law controlling state forfeitures. The process is so inviting that state and local agencies regularly ask federal agencies to "adopt" forfeitures of property that arise factually through a state law violation that also happens to be a federal law violation that allows forfeiture. *Review of Federal Asset Forfeiture Program: Hearings before the Legislation and National Security Subcomm. of the House Comm. on Government Operations*, 103d Cong. 69 (June 22, 1993) (statement of Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture, Dept. of Just.) (admitting "there are many instances where we have done that [adopted a state seizure]"). Once

"adopted," most (up to 80%) of the forfeited cash or proceeds from sale go from the federal government right back to the state or local agency which now does not need to account for it under state forfeiture law or procedures. This end run effectively allows state and local agencies to avoid state efforts to control incentives.

For example, in Missouri, the state legislature attempted to remove the bounty aspect of state forfeiture by requiring that seized assets go not to law enforcement, but directly to the Department of Education. Mo. Rev. Stat. § 513.623. Shortly afterward, the U.S. Attorney in the Western District of Missouri wrote a letter encouraging local law enforcement to file their forfeitures with the U.S. Department of Justice, rather than with the state. If they did so, the federal government would then return 80% of the seizure back to the local agency. Karen Dillon, *Lawmakers Again Hope to Tighten Up Law On Forfeitures*, Kansas City Star, Jan. 2, 1999 (available at www.kcstar. com/projects/drugforfeit/split.htm). Local police took up the U. S. Attorneys' invitation. When challenged, police argued that when they took property away from the property owners, they were not actually "seizing it," but rather were "holding" it until the federal government could "seize" it. Karen Dillon, *Police Sidestep Seizure Law, Report Says*, Kansas City Star, January 11, 2000 (available at www.kcstar. com/projects/drugforfeit/for3.htm). A joint committee of the Missouri legislature held hearings and concluded that police were simply ignoring the state law because by doing so, they could get money for their agencies. *Id.* Missouri has amended its legislation numerous time to try to force police to comply with the forfeiture laws.

The Missouri example is not unique. Indeed, there cannot be any serious question that the naked and alluring incentive of

direct financial gain can and sometimes does affect the way the government carries out the forfeiture process. Courts have repeatedly recognized not just the possibility but also the fact that the civil forfeiture proceedings regularly violate due process principles. "We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes." *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992). Or, as the Seventh Circuit recently concluded: "[T]he government's conduct in forfeiture cases leaves much to be desired." *United States v. $ 506,231 In United States Currency*, 125 F.3d 442, 454 (7th Cir. 1997). Further,

> [T]he war on drugs has brought us to the point where the government may seize . . . a citizen's property without any initial showing of cause, and put the onus on the citizen to perfectly navigate the bureaucratic labyrinth in order to liberate what is presumptively his or hers in the first place. . . . Should the citizen prove inept, the government may keep the property, without ever having to justify or explain its actions.

Muhammed v. Drug Enforcement Agency, 92 F.3d 648, 654 (8th Cir. 1996). This Court has itself recognized the great potential for abuse: "Forfeiture provisions are powerful weapons in the war on crime; like any such weapons, their impact can be devastating when used unjustly." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 634 (1989). And members of Congress have also noted the problem: "[M]ay I suggest there are some incentives for some police organizations not to do this [comply with due process], because they share in the proceeds of the seized property. It is like the speed trap along the rural highway where the sheriff

waits for us, takes us to a magistrate, and his salary is paid out of the fines he levies against us." Cong. Rec. H4854 (June 24, 1999) (statement of Rep. Hyde). "We should not put our police officers on a bounty system." *Id.* at H4863 (statement of Rep. Frank). Although some of these problems have been addressed through forfeiture reform, *see* Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 185, 114 Stat. 202, the basic structure remains: the agencies effecting the forfeitures still remain the direct beneficiaries of that process.

2. The Circumstances of a Federal Inmate Require the Government to Provide Actual Notice of Forfeiture Proceedings.

Against this backdrop of direct government financial interest stands the question of whether an inmate in the custody of the federal government who did not receive actual notice of the proposed forfeiture of his property nevertheless obtained due process because there was some chance he might receive actual notice. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Court articulated what is required under the Due Process Clause: "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. The Court further held that what process was due depended entirely on a due regard for the "practicalities and particularities of the case." *Id.* Here, the Sixth Circuit focused overmuch on what is "reasonably calculated" for a typical situation but failed to consider those practicalities and peculiarities.

This Court did not hold in *Mullane* or any other case, that due process would *never* require personal service or actual

notice. To the contrary, the Court observed that "[p]ersonal service has not in *all* circumstances been regarded as indispensable to the process due . . . ." *Id.* (emphasis added). And in *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 804 (1983), this Court stated that "actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party . . . if its name and address are reasonably ascertainable." Moreover, actual notice is exactly what due process aims at since holding a hearing is of little use if one party is actually unaware of it. *Mullane*, 339 U.S. at 314 ("This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."). And this Court has required particularly extensive efforts to provide notice when the circumstances relevant to the notice issue include the state's awareness of a party's inexperience or incompetence. *See, e.g., Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13-15 (1978) (where notices regarding potential termination for failure to pay utility bills were sent to thousands of people of varying levels of education and intelligence, utility had a due process obligation to inform customers in detail about the opportunity for a hearing); *Covey v. Town of Somers*, 351 U.S. 141, 146-47 (1956) (due process required more than a written letter when the town officials knew the recipient was mentally incompetent to read or understand the foreclosure letter.) Similarly, special circumstances here that are known to the government require more than a mere mailing.

Five significant circumstances together required the government to provide actual notice rather than constructive notice to Mr. Dusenbery.

A. First, as noted above, the government stands to benefit directly if there are no objections to the forfeiture proceeding. This circumstance should weigh in the due process analysis. Evaluating the government's conduct according to its self-interest is hardly a novel proposition. In cases dealing with the Contract Clause, this court has recognized that "complete deference to a legislative assessment of reasonableness and necessity is not always appropriate because the State's self-interest is at stake." *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 26 (1977); *see also Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 412-13 & n.14 (1983) (noting a stricter level of scrutiny applies under the Contracts Clause when a state changes its own contractual obligations). And in *United States v. Winstar*, 518 U.S. 839, 898 (1996), this Court noted that "[t]he greater the Government's self-interest, however, the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the government's improvidence . . . ." The law of government contracts recognizes the same principle when it concludes, for example, that when the government is acting in its commercial interest, it is subject to the doctrine of equitable estoppel even though that doctrine does not apply to the government when it is acting in its sovereign capacity. *See United States v. Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir. 1970).

Congress has also recognized that different considerations apply to the government's financial interest than to its sovereign interests. Thus, in bankruptcy law, although government lawsuits filed to enforce the police or regulatory power are exempted from the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 362(b), government suits filed to claim a pecuniary interest in the debtor's property are not so exempted. *Missouri v. United States Bankruptcy Court for the*

Eastern District of Arkansas, 647 F.2d 768, 776 (8th Cir. 1981). Thus, when the government assesses or collects taxes, *Universal Life Church, Inc. v. United States*, 128 F.3d 1294 (9th Cir. 1997), claims contractual default, *Corporacion de Servicios Medicos Hospitalanos de Fajardo*, 805 F.2d 440, 445 (1st Cir. 1986), or withholds Medicare funds from debtor health care providers, *In re University Medical Center*, 973 F.2d 1065, 1075 (3d Cir. 1992), the government is acting in its pecuniary interest and is not exempted from the stay it would otherwise enjoy.

Together, these cases recognize that when the government has a pecuniary interest, that interest must be accounted for in the rules that apply to prevent the government's advantages over the governed from causing fundamental unfairness. Thus, if the agency doing the forfeiture will get more money *for itself* if no one contests the forfeiture, due process and fundamental fairness require that that agency give actual notice of the forfeiture.

B. The second significant circumstance requiring actual notice in this case is that unlike a free citizen who receives his or her mail directly from a post office employee (who not only has no interest in depriving the citizen of her mail, but who also commits a crime if he does not deliver it), the inmate receives his mail only by the good graces of the same agency that seeks the forfeiture. Thus, the inmate depends on the prison – the same prison that may benefit from a renovation if enough forfeiture funds are available[2] – to get

[2]A major component of spending from the Asset Forfeiture Fund has been prison construction. From 1985 to 1992, $540 million from the Asset Forfeiture Fund went to build or expand prisons. (*Review of Federal Asset Forfeiture Program: Hearings before the House Comm. on Government Operations*, 103d Cong. 77 (June 22, 1993) (prepared statement of Cary H. Copeland, Director, Executive Office for Asset Forfeiture, Office of the Deputy Attorney General).

the notice to him. The long-held assumptions about the mail being reliable pertain to the U.S. Postal Service, a disinterested third party whose only mission is to deliver the mail. That assumption cannot apply to the U.S. Bureau of Prisons, an interterested party whose mission is to incarcerate felons, not to deliver mail. Moreover, given that here, the Department of Justice controls both the forfeiture and the incarceration, that agency has direct access to the inmate as well as the ability to require prisons to use particular procedures designed to ensure actual notice in forfeiture cases. It is therefore not an undue burden to require that agency to provide actual notice.

C. Third, the failure of notice in this case cannot be ascribed to Mr. Dusenbery's lack of care or oversight of his property. Although constructive notice may have been historically justified by the notion that those with property had a duty to act reasonably to keep themselves apprised of proceedings that affected that property, *see Mennonite Board of Missions*, 462 U.S. at 804 (O'Connor, J., dissenting), that justification has no application here. Unlike the unpaid tax cases in which the property owners surely knew they had not paid their taxes, and thus should reasonably expect some foreclosure activity and could take steps to monitor such activity, many inmates may have no reason to believe their property will be forfeited. And even if they suspect it, they have no way to determine whether such proceedings have yet begun short of actual notice from the government. *See Houston v. Lack, Warden*, 487 U.S. 266, 270-71 (1988) (noting limitations on prisoner's ability to monitor proceedings in a court or prison authority's actions, or to take precautions to

protect interests).

Moreover, the law as to what may be forfeited and what may not is complex, especially when there are differences between state and federal law. For example, Illinois law forbids forfeiture of family farms, so a person arrested and convicted under state law might expect his family farm to remain intact. But federal prosecutors have nevertheless seized and forfeited family farms in Illinois under federal law. *Civil Asset Forfeiture Reform Act: Hearings before the House Comm. on the Judiciary*, 104th Cong. 28-29 (July 22, 1996) (statement of Mr. Steve Komie, Secretary, Illinois State Bar Ass'n). And finally, even if an inmate expected *some* property to be forfeited due to its use in connection with the crimes for which the inmate is incarcerated, the government may very well seize other property that is not, in fact, properly subject to forfeiture. But the inmate is not in a position to even know the property has been seized, much less that an administrative forfeiture has been initiated. Thus, because there is little an inmate can do to monitor his property, the notice from the government is the *only* way the inmate will have actual knowledge of forfeiture proceedings.

D. Fourth, unlike the circumstances in several of the due process decisions before this Court, this proceeding involves only Mr. Dusenbery. Like most forfeiture cases, no one else is protecting the inmate's interest. In contrast, in *Mullane*, the Court noted that notice reasonably calculated to reach some members of the class helped to safeguard the interests of all members of the class since their interests were the same and therefore the arguments of one would inure to the benefit of those who did not get actual notice. Here, the only person who could receive notice was Mr. Dusenbery. If he did not get notice, no one else would be protecting his interests.

This factor weighs in favor of actual notice.

E. Finally, there is no judicial review of the forfeiture action in the absence of a claim from an objector. Under the administrative forfeiture procedure, if Mr. Dusenbery did not get notice and file a claim, the government need only declare the property forfeited and immediately sell or dispose of it. 19 U.S.C. § 1609. No further action by the government was necessary to keep the property. In contrast, in *Mullane*, the court itself offered some measure of protection, since even if no out-of-state beneficiaries appeared, the Surrogate's Court still had to approve and enter the final decree accepting the accounting. That the final result had to be approved by an unbiased and objective court offered at least a measure of protection to those who were deprived of notice. In the administrative forfeiture at issue here, if the notice is met with silence, either intentional or otherwise, the matter automatically ended in favor of the government without any disinterested review of the government's action.

These circumstances demonstrate that the "mere mailing of a notice -- even with a required return receipt signed not by the addressee but by the institution -- does not satisfy the requirement of *Mullane* that the means of giving notice 'be such as one desirous of actually informing [the owner] might reasonably adopt.'" *Weng v. United States*, 137 F.3d 709, 715 (2d Cir. 1998); *see also, United States v. Woodall*, 12 F.3d 791 (8th Cir. 1993).

3. In Other Civil Proceedings, Mailing Simply Raises a Rebuttable Presumption of Actual Notice.

The frequent use of the mails, and the general reliability of

them has long been an accepted fact of legal practice in both state and federal courts. *See Mullane*, 339 U.S. at 319 (noting the mails are "an efficient and inexpensive means of communication" that generally may be relied upon to deliver notice where it is sent). Significantly, the Federal Rules do not allow service of a summons to occur by mail but require personal or actual service. Only after it is clear that the party has knowledge that the matter is pending is service by mail of other pleadings allowed under Rule 5. But even then, the act of mailing simply raises a rebuttable presumption that the letter was properly delivered and received. *Hagner v. United States*, 285 U.S. 427, 430 (1932); *Wisconsin ex rel. Flores v. Wisconsin*, 516 N.W.2d 362, 371 (Wisc. 1994). That presumption may not be given conclusive effect without violating the due process clause. *Godfrey v. United States*, 997 F.2d 335, 338 (7th Cir. 1993); *United States v. Bowen*, 414 F.2d 1268, 1273 (3d Cir. 1969). Thus, the presumption is rebuttable – proof of mailing the notice merely shifts the burden to the challenging party of presenting credible evidence that the notice was not received. If the intended recipient denies receiving the notice, the presumption is spent and a question of fact is raised. 997 F.2d at 339-40. The issue then becomes one of credibility for a fact-finder who must decide the contested issue of fact as to whether the notice was received or not.

Although the Federal Rules of Civil Procedures obviously provide procedures that may be beyond the constitutional minimum, it is nevertheless instructive that when anyone seeks to take another person's property in any manner *other* than civil forfeiture, personal service (actual notice) is required at some point. Indeed, if during that proceeding any other notices are required, and the intended recipient denies receiving them in the mail, the recipient has at least an opportunity to demonstrate that he or she did not receive actual notice. But when the

government seeks to take a prisoner's property party by administrative forfeiture, it argues that not only can it initiate and complete the whole forfeiture procedure even if the prisoner does not receive notice, but also that whether the prisoner actually received notice is irrelevant to due process. This complete "disregard for due process," as the Seventh Circuit noted, must not be allowed to stand.

CONCLUSION

In the circumstances presented here, where a federal inmate whose property the government seeks to forfeit for its own direct financial gain does not receive actual notice of the forfeiture proceeding, due process has been denied. The decision of the Sixth Circuit should be reversed.

Respectfully submitted,

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